Supreme Court, U.S.
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No. 02 312

In The
Supreme Court of the United States

H&R BLOCK, INC.,

Petitioner,

v.

MARIE ANDERSON, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI OF PETITIONER H&R BLOCK, INC.

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals for the Eleventh Circuit erred when it failed to hold, in direct conflict with the Court of Appeals for the Eighth Circuit and in contravention of Supreme Court authority, that usury claims against a national bank necessarily arise under Section 30 of the National Bank Act, 12 U.S.C. §§ 85-86, providing the district court with removal jurisdiction under the doctrine of complete preemption?

PARTIES TO THE PROCEEDING BELOW

Defendants-Appellees: Beneficial National Bank, Inc., Beneficial Tax Masters, Inc. and H&R Block, Inc.

Plaintiffs-Appellants: Marie Anderson, Alvester Brafort, Walter Brutley, Patricia Coleman, Talaya Cope, Audrey Darby, Annie Davis, April DeLoach, Diane Franklin, Lillie Franklin, Willie Lewis, Caledonia Jackson, Shirley Jernigan, Evelyn Nelson, Willie Lawrence, Mamie Mitchell, Betty Person, Diane Peterson, Gwen Rogers, William Screws, Ernestine Starks, Gerald Stokes, Albert Thomas, Charles Thomas, Kenneth Williams, and Earline Young.

RULE 29.6 STATEMENT

There is no parent or publicly held company that owns 10% or more of H&R Block, Inc.'s stock.

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The opinion of the panel of the United States Court of Appeals for the Eleventh Circuit is reported at 287 F.3d 1038, and is reproduced in the Appendix at pages 1a-22a.

The opinion of the United States District Court for the Middle District of Alabama is published at 132 F. Supp. 2d 948, and is also included in the Appendix at pages 23a-32a.

STATEMENT OF JURISDICTION

The judgment of the panel of the United States Court of Appeals for the Eleventh Circuit was entered on April 3, 2002. A petition for rehearing en banc was denied on May 29, 2002. (Appendix at page 33a). This Court has jurisdiction under 28 U.S.C. § 1254(1) as this is a petition for writ of certiorari for review of a judgment of a United States Court of Appeals.

PERTINENT PROVISIONS

The relevant provisions of the National Bank Act, 12 U.S.C. §§ 85-86, are set forth in the Appendix to this petition at pages 34a-35a.

STATEMENT OF THE CASE

This suit arises from tax refund anticipation loans ("RALs") that Beneficial National Bank ("Beneficial") – at all times pertinent hereto, a national bank chartered

under the National Bank Act – made to customers of subsidiaries and franchisees of H&R Block, Inc. ("Block"). A RAL is a loan made to a tax preparation service customer by a bank in the amount of his or her anticipated tax refund, less the fees charged by the lender and the tax preparation service, which files the customer's tax return electronically. A RAL enables a taxpayer to receive the amount of his or her anticipated tax refund, less applicable charges, within just a few days.

The respondents in this case, each of whom received a RAL from Beneficial, filed a complaint in Alabama state court on September 19, 2000 against Beneficial, Beneficial Tax Masters ("Tax Masters") and Block, alleging that they were charged excessive and usurious interest under Alabama statutory and common law on the RALs that they received from Beneficial.

On October 24, 2000, Block, Beneficial and Tax Masters timely removed the action to the United States District Court for the Middle District of Alabama. Jurisdiction was invoked under 28 U.S.C. § 1331 on the grounds that the action necessarily arose under the laws of the United States. The respondents filed a motion to remand the case back to state court on November 22, 2000. The district court denied the motion to remand on December 14, 2000, finding that the claims of excessive and usurious interest against Beneficial, a national bank, necessarily arose under Section 30 of the National Bank Act, and were therefore completely preempted by the National Bank Act. *Anderson v. H&R Block, Inc.*, 132 F. Supp. 2d 948 (M.D. Ala. 2000) (*see* Appendix at pages 23a-32a). The district court certified the issue for interlocutory appeal.

On appeal, a panel of the United States Court of Appeals for the Eleventh Circuit issued a split opinion reversing the district court's decision. *Anderson v. H&R Block, Inc.*, 287 F.3d 1038 (11th Cir. 2002) (*see* Appendix at pages 1a-22a). After analyzing Supreme Court and Eleventh Circuit decisions on complete preemption, the majority concluded that "congressional intent is the pivotal issue in the complete preemption inquiry." 287 F.3d at 1043-44 (Appendix at p. 10a). The majority noted that in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), this Court applied complete preemption to permit removal after finding a clear congressional intent to permit removal with respect to the statute in question in that case. *Id.* at 1043 (Appendix at p. 8a). The majority acknowledged that the National Bank Act "was enacted more than a decade before Congress gave federal courts general federal question jurisdiction, more than two decades before the development of the well-pleaded complaint rule, and more than a century before the articulation of the complete preemption doctrine." *Id.* at 1044 (Appendix at p. 10a-11a). The majority did not, however, find this fact a sufficient basis to forego a showing of specific congressional intent in the National Bank Act to permit removal.

The majority ultimately concluded that, with respect to the National Bank Act, it could not find evidence of "clear congressional intent to permit removal" of state law usury claims against national banks. *Id.* at 1047 (Appendix at p. 17a). The majority acknowledged that its conclusion was in conflict with the holdings of the United States Court of Appeals for the Eighth Circuit in *M. Nahas & Co. v. First Nat'l Bank*, 930 F.2d 608, 612 (8th Cir. 1991), and *Krispin v. May Dept. Stores Co.*, 218 F.3d 919, 922 (8th Cir. 2000), which hold that the National Bank Act completely preempts state law usury claims against national banks.

Id. at 1046 (Appendix at p. 14a). The majority stated that the Eighth Circuit decisions allowed complete preemption "based solely on well-settled law that [the National Bank Act] . . . provides the exclusive remedy for usury claims against a national bank." *Id.* (Appendix at 14a-15a). The majority held a federal statute will not completely preempt a state law claim unless there is also explicit evidence of congressional intent to permit removal. *Id.* at 1047 (Appendix at p. 17a).

Block, Beneficial and Tax Masters filed timely petitions for rehearing en banc with the Eleventh Circuit, which were denied on May 29, 2002.

REASONS FOR GRANTING THE WRIT

The divided Eleventh Circuit panel found that the National Bank Act, 12 U.S.C. §§ 85-86, does not completely preempt state law claims of usury and excessive interest against national banks, and therefore did not provide a basis for removing respondents' state-law usury claims to federal court. The majority based its decision upon the fact that it could not find sufficient evidence of "clear congressional intent to permit removal" of state law usury claims against national banks. 287 F.3d at 1047 (Appendix at p. 17a). The majority acknowledged that its holding is in direct conflict with the decisions of the United States Court of Appeals for the Eighth Circuit, which hold that the National Bank Act does completely preempt state law claims of usury and/or excessive interest against national banks, thereby permitting removal of such claims to federal court. The decision also sharply contradicts repeated rulings of this Court, which recognize that claims

of usury against national banks necessarily arise under federal law. Accordingly, this Court's review is warranted.

I. THERE IS A CONFLICT IN THE CIRCUITS CONCERNING WHETHER THE NATIONAL BANK ACT COMPLETELY PREEMPTS STATE LAW USURY CLAIMS AGAINST NATIONAL BANKS THAT SHOULD BE RESOLVED BY THIS COURT.

The Eleventh Circuit's interpretation that the complete preemption doctrine does not provide federal jurisdiction in this case is in direct conflict with the United States Court of Appeals for the Eighth Circuit, which decided in *M. Nahas & Co. v. First Nat'l Bank*, 930 F.2d 608, 612 (8th Cir. 1991), that the complete preemption doctrine applies to claims under section 30 of the National Bank Act, 12 U.S.C. §§ 85-86. Before outlining the full scope of this conflict, a brief description of the concept of complete preemption is necessary to place the issues in context.

A. The Complete Preemption Doctrine.

Removal of a case from state to federal court is proper if the case could have been brought originally in federal court. 28 U.S.C. § 1441(a). Whether the federal court has the necessary federal question jurisdiction to hear the case after removal depends on whether the "action aris[es] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Under the well-pleaded complaint rule, a court generally must look to the face of the complaint to determine whether a claim "arises under" federal law, *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987), and the availability of federal defenses asserted by

the defendant will not support removal jurisdiction. *Franchise Tax Bd. v. Construction Laborers Vacation Trust,* 463 U.S. 1, 14 (1983).

However, "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." *Id.* at 23 (citation omitted). Under Supreme Court case law, an independent "corollary" to the well-pleaded complaint rule has developed which provides "that Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987). Complete preemption is jurisdictional in nature rather than simply an affirmative defense. As such, it authorizes removal to federal court even if the complaint is artfully pleaded to include only state law claims for relief. *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1981).

According to the Supreme Court, complete preemption occurs when "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *See Caterpillar,* 482 U.S. at 393 (quoting *Metropolitan Life*, 481 U.S. at 65). "Because they are recast as federal claims, state law claims that are held to be completely preempted give rise to 'federal question' jurisdiction and thus may provide a basis for removal." *McClelland v. Gronwaldt*, 155 F.3d 507, 512 (5th Cir. 1998); *see also* Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 Tex. L. Rev. 1781, 1794 (June 1998) ("The stated rationale for this deviation from what is one of the fundamental cornerstones of federal subject matter jurisdiction is that, in these cases, federal law not only preempts a state law to

some degree but also substitutes a federal cause of action for the state cause of action.") (internal quotation marks omitted).

In modern decisions applying this concept, this Court has found complete preemption under two federal statutes: section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and section 502(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a). Significantly, however, this Court has not held that the complete preemption doctrine is confined solely to section 301 of the LMRA and section 502(a) of ERISA.

The opinion that originated the complete preemption doctrine was *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968). In *Avco*, this Court held that a state court lawsuit to enjoin a defendant union from striking actually arose under section 301 of the LMRA, which grants federal jurisdiction for suits alleging violations of collective bargaining agreements. 390 U.S. at 560. This Court therefore concluded that the case was removable to federal court. *Id.*

Although this Court in the *Avco* decision provided little elaboration for its holding, this Court later characterized its holding in *Avco* as follows:

> The necessary ground of decision was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." . . . Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely

> preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.

Franchise Tax, 463 U.S. at 23-24.

This Court extended the complete preemption doctrine in *Metropolitan Life*, 481 U.S. 58. In that case, this Court relied on *Avco* to conclude that state claims falling within the scope of section 502(a) of ERISA are necessarily federal in character and therefore removable to federal court. 481 U.S. at 63-64, 67. While recognizing the "well-pleaded complaint" rule that a federal law defense to a state law claim is not sufficient to confer federal question jurisdiction, this Court stated an exception exists where federal law completely preempts the state law claim. In this circumstance, a claim is necessarily federal in character, despite artful pleading by a plaintiff to avoid the invocation of federal law. This Court explained:

> Federal preemption is ordinarily a federal defense to the plaintiffs' suit. As a defense, it does not appear on the face of a well-pleaded complaint and, therefore, does not authorize removal to federal court. One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.

Metropolitan Life, 481 U.S. at 63-64 (internal citation omitted).

In the *Metropolitan Life* decision, this Court noted that the "complete preemption" exception had historically applied to claims preempted by Section 301 of the LMRA,

see 481 U.S. at 64 (citing *Avco,* 390 U.S. 557), but this Court made clear the complete preemption doctrine is not limited to LMRA cases. Upon analysis of the applicable provisions of ERISA, this Court concluded ERISA completely preempted the employee's claim for wrongful termination and, therefore, Metropolitan Life could remove the case to federal district court under its federal question jurisdiction. 481 U.S. at 67. This Court's finding of complete preemption was based upon, among other things, the fact that the jurisdictional subsection of the ERISA statute and the legislative history surrounding enactment of ERISA "set[ ] out [Congress's] clear intention to make 502(a)(1)(B) suits . . . federal questions for the purposes of federal court jurisdiction in like manner as § 301 of the LMRA." *Id.* at 66. This Court noted that "Congress ha[d] clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of §502(a) removable to federal court." *Id.* This Court did *not*, however, hold that explicit evidence of congressional intent to permit removal was a prerequisite to a finding of complete preemption. Indeed, this Court stated to the contrary: "In the absence of explicit direction from Congress, this question would be a close one." *Id.* at 64.

To Block's knowledge, this Court has not revisited the complete preemption doctrine in the context of any federal statute outside the LMRA and ERISA.

B. The Court of Appeals' Decision Directly Conflicts With Decisions of the United States Court of Appeals for the Eighth Circuit.

In the present case, the majority panel of the Eleventh Circuit Court of Appeals held that the National Bank Act

does not completely preempt state law usury claims against national banks. This holding was based on the majority's conclusion that there was insufficient evidence of "clear congressional intent to permit removal" of state law usury claims against national banks. *Anderson*, 287 F.3d at 1047 (Appendix at p. 17a). As noted above, this holding is in direct conflict with the United States Court of Appeals for the Eighth Circuit.

In *M. Nahas & Co. v. First Nat'l Bank*, 930 F.2d 608, 612 (8th Cir. 1991), the Eighth Circuit held that the complete preemption doctrine applies to claims under section 30 of the National Bank Act, 12 U.S.C. §§ 85-86. Therefore, under Eighth Circuit precedent, any civil complaint alleging excessive interest or usury by a national bank is "necessarily federal in nature and properly removable." *Nahas* at 612 (citation omitted). Moreover, in the Eighth Circuit's view, "'a plaintiff cannot thwart the removal of a case by inadvertently, mistakenly or fraudulently concealing the federal question that would necessarily have appeared if the complaint had been well pleaded.'" *Id.* (quoting 1A *Moore's Federal Practice* ¶ 0.160 [3.-3], at p. 234 (1990 ed.)).

In finding that the National Bank Act completely preempts state law usury claims against national banks, the Eighth Circuit found significant this Court's determination that in enacting the National Bank Act, "Congress has prescribed in the national banking laws precisely what remedies are available against a national bank for usury, in order to promote remedial uniformity and to protect national banks from destructive usury penalties frequently available under state law." *Id.* at 610 (citing *Farmers' & Mechanics Nat'l Bank v. Dearing*, 91 U.S. 29 (1875)). The Eighth Circuit cited a line of this Court's

decisions holding that "'since Congress has provided a penalty for usury, that action preempts the field and leaves no room for varying state penalties.'" *Id.* (quoting *First Nat'l Bank v. Nowlin,* 509 F.2d 872, 881 (8th Cir. 1975), and citing *McCollum v. Hamilton Nat'l Bank,* 303 U.S. 245 (1938) and *Barnet v. National Bank,* 98 U.S. 555 (1879).

Turning to the issue of removal jurisdiction, the Eighth Circuit discussed this Court's holding in *Metropolitan Life*, which permitted removal of a purported state-law claim in an area completely preempted by federal law. The Eighth Circuit stated that under *Metropolitan Life,* the complete preemption doctrine is "limited to federal statutes that 'so completely pre-empt a particular area, that any civil complaint raising this select group of claims is necessarily federal.'" *Nahas*, 930 F.2d at 612 (quoting *Metropolitan Life*, 481 U.S. at 65). Turning to this Court's decision in *Avco*, the Eighth Circuit noted that under this Court's precedents, "removal is most appropriate where Congress has created an exclusive federal remedy that displaces any overlapping or inconsistent state remedies." *Id.* The Eighth Circuit concluded:

> That is precisely the situation here. Section 86 is an exclusive federal remedy, created by Congress over 100 years ago to prevent the application of overly-punitive state law usury penalties against national banks. . . . Thus, whether or not plaintiff artfully attempted to couch its complaint wholly in state law terms, it was necessarily federal in nature and properly removable.

Id. at 612. The Eighth Circuit recently confirmed its holding in *Nahas*. *See Krispin v. May Dept. Stores Co.*, 218 F.3d 919, 922 (8th Cir. 2000).

C. Other Circuits Have Addressed Complete Preemption by the National Bank Act in Conflicting Decisions.

In addition to the Eighth Circuit, the Fifth Circuit Court of Appeals has affirmed, in a per curiam decision, the determination by a Louisiana district court that the National Bank Act completely preempted state law excessive interest claims against Block in a RAL case similar to the case at hand. *Battiste v. H&R Block, Inc.*, 209 F.3d 719 (5th Cir. 2000), *aff'g* No. 97-CV-749-A (M.D. La. Jan. 13, 1998) (*see* Appendix at pages 36a-43a). However, a divided panel of the Court of Appeals for the Third Circuit decided that the National Bank Act does not confer complete preemption over state law usury claims against national banks. *See Spellman v. Meridian Bank,* Nos. 94-3203, 94-3204, 94-3215 to 94-3218, 1995 WL 764548 (3d Cir. Jan. 12, 1996), *vacated and set for reh'g en banc,* 1996 U.S. App. LEXIS 2506 (3d Cir. Feb. 16, 1996). This decision was vacated, and the Third Circuit ordered a rehearing en banc. Before the full court could address the issue, however, the plaintiffs dismissed the case, leaving the issue unresolved.

Decisions among the district courts are also divided. While a number of district courts in other circuits have adopted the Eighth Circuit's view that the National Bank Act completely preempts state law usury claims against national banks, *see Watson v. First Union Nat'l Bank,* 837 F. Supp. 146, 149 (D.S.C. 1993) (collecting cases), other courts have remanded cases removed by national banks, finding that the National Bank Act does not confer complete preemption. *See, e.g., Copeland v. MBNA America,* 820 F. Supp. 537, 541 (D. Colo. 1993).

D. Resolution of the Conflict is Essential.

The decisions of the Eighth and Fifth Circuits, unlike the Eleventh Circuit's panel decision in this case, demonstrate that Section 30 of the National Bank Act completely preempts usury claims against national banks that are purportedly based upon state law, thereby providing a basis for removal jurisdiction from state court to federal court. Resolution of this conflict is important. Without consideration of this case by this Court, the conflicting law on this issue will subject national banks to different standards regarding removal depending upon the circuit in which they are sued. This conflict will not be resolved absent a decision of this Court.

II. THE ELEVENTH CIRCUIT'S HOLDING THAT THE NATIONAL BANK ACT DOES NOT COMPLETELY PREEMPT STATE LAW USURY CLAIMS AGAINST NATIONAL BANKS IS FLATLY INCONSISTENT WITH NUMEROUS RULINGS OF THIS COURT, WHICH HAVE HELD THAT USURY CLAIMS AGAINST NATIONAL BANKS NECESSARILY ARISE UNDER FEDERAL LAW.

A. This Court's Precedents Establish That All Causes of Action For Usury Against National Banks Necessarily Arise Under Federal Law.

Under this Court's precedents, it is evident that Congress, in passing Section 30 of the National Bank Act (12 U.S.C. §§ 85-86), intended for usury actions against national banks to arise under federal law. This Court has long recognized that Section 30 of the National Bank Act, 12 U.S.C. §§ 85-86, *exclusively* defines federal usury law and

supersedes (i.e., preempts) state usury laws, and provides the *exclusive* remedy for any violation of such law. First, in *Dearing,* decided shortly after the National Bank Act was enacted, the Supreme Court recognized that the provisions contained in Section 30 of the National Bank Act "form a system of regulations . . . [whose] parts are in harmony with each other, and *cover the entire subject.*" 91 U.S. at 32 (emphasis added). This Court further noted that "[t]he power to supplement [section 30] by State legislation is conferred neither expressly nor by implication." *Id.* at 35.

Three years later, in *Barnet v. National Bank*, 98 U.S. 555 (1878), this Court reiterated its view that Section 30 of the National Bank Act provides an exclusive federal claim and remedy for usury against national banks: "The [state] statutes . . . upon the subject of usury . . . cannot affect the case. Where a statute [the National Bank Act] creates a new right or offence, and provides a specific remedy or punishment, they alone apply. *Such provisions are exclusive.*" *Id.* at 558 (emphasis added). *See also Evans v. National Bank,* 251 U.S. 108, 109 (1919) ("[W]hether transactions by [a national bank] are usurious and the consequent penalties therefor *must* be ascertained upon a consideration of the National Bank Act.") (emphasis added).

Finally, in *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 308 (1978), this Court held that Section 85 of the National Bank Act established the exclusive limitation on the interest rates chargeable by the bank: "Omaha Bank is a national bank; it is an 'instrumentalit[y] of the federal government, created for a public purpose, and as such *necessarily subject to the paramount authority of the United States.*' . . . The interest rate that Omaha Bank may charge in its BankAmericard program is

thus *governed by federal law*." *Id.* at 308 (emphasis added) (quoting *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896) and citing *Dearing*, 91 U.S. at 34). This Court noted that a "[c]lose examination of the National Bank Act of 1864, its legislative history, and its historical context makes clear that . . . Congress intended to facilitate . . . 'a national banking system.'" *Id.* at 314-15. This Court continued: "To the extent the enumerated federal rates of interest are greater than permissible state rates, *state usury laws must, of course, give way to the federal statute*." 439 U.S. at 318, n.31 (emphasis added).

In applying Section 85, this Court held that, despite the Bank's conduct of a credit card operation and solicitation of customers in Minnesota, it nevertheless was "located" for purposes of Section 85 in Nebraska, at the address specified in its charter. 439 U.S. at 309. Therefore, this Court held, federal law empowered the bank to "export" rates permitted under Nebraska law to its customers in Minnesota, notwithstanding the usury limitations of Minnesota law. This Court reaffirmed the preemptive effect of Section 85, even while recognizing it would "impair" the ability of states to establish uniform maximum interest rates within its borders: "Petitioners' final argument is that the 'exportation' of interest rates, such as occurred in this case, will significantly impair the ability of States to enact effective usury laws. This impairment, however, has always been implicit in the structure of the National Bank Act. . . . " 439 U.S. at 318. *See also Smiley v. Citibank*, 517 U.S. 735, 744 (1996) (stating, in dicta, that "there is no doubt that § 85 pre-empts state law.").

Thus, for over a century, this Court has consistently recognized that Section 30 of the National Bank Act, 12

U.S.C. §§ 85-86, completely displaces state law usury claims against national banks. Accordingly, under this Court's precedents, usury claims against national banks necessarily arise under federal law, providing a basis to remove such claims to federal court. Stated in modern terms, the holdings of this Court make clear that the National Bank Act "completely preempts" state law usury claims against national banks.

B. The Modern Complete Preemption Cases of this Court Compel the Conclusion that the National Bank Act Completely Preempts State Law Usury Claims Against National Banks.

As discussed above, under the early National Bank Act decisions that predate the modern label "complete preemption," this Court has repeatedly held that usury claims against national banks necessarily arise under the National Bank Act. But even if this Court had not previously resolved this basic question under its early decisions, a plaintiff's claim for usury and/or excessive interest against a national bank would be completely preempted, and thus removable, under the modern complete preemption cases of this Court.

Under this Court's decisions, the complete preemption doctrine allows removal of a state court action even if the plaintiff has couched its claims in state law terms where "the preemptive force" of federal law "is so powerful as to displace entirely any state cause of action." *Franchise Tax,* 463 U.S. at 23. That is the case here: (1) the National Bank Act preempts state law claims for usury against national banks, and (2) the "preemptive force" of the National Bank Act provides the exclusive remedy for usury

claims against national banks, thereby "displac[ing] entirely any state cause of action." *Id.*

"[T]here is no doubt that § 85 pre-empts state law." *Smiley*, 517 U.S. at 744. *See also Marquette,* 439 U.S. at 318, n.31 ("[S]tate usury laws must, of course, give way to the federal statute."). Thus, the first requirement for complete preemption is satisfied in this case. This Court's second requirement for complete preemption – that the "preemptive force" of federal law "displace entirely any state cause of action" – is also met in this case. Section 86 of the National Bank Act provides that if a national bank charges interest greater than that allowed by the laws of its home state, the bank is subject to a penalty of forfeiture of that part of the interest which has yet to be paid, as well as twice the amount of the interest which has already been paid. 12 U.S.C. § 86. For well over a century, this Court has held that Section 86 provides the "exclusive" remedy in favor of borrowers for excessive loan charges collected by a national bank. *See, e.g., Dearing*, 91 U.S. at 32 (recognizing that the provisions contained in Section 30 of the National Bank Act "form a system of regulations . . . [whose] parts are in harmony with each other, and cover the entire subject."); *Barnet*, 98 U.S. at 558 (holding that "[t]he [state] statutes . . . upon the subject of usury . . . cannot affect the case. Where a statute [the National Bank Act] creates a new right or offence, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive.").

This Court's decisions regarding the National Bank Act set forth its understanding of Congress's intent in passing the National Bank Act. As this Court has held, through the National Bank Act, "Congress intended to facilitate . . . a 'national banking system.'" *Marquette*, 439

U.S. at 314-315. Indeed, national banks are federal instrumentalities serving federal policy objectives and, accordingly, are afforded special powers under the National Bank Act. *Id.* at 308 ("Omaha Bank is a national bank; it is an 'instrumentalit[y] of the federal government, created for a public purpose. . . . '") (quoting *Davis*, 161 U.S. at 283); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 375 (1954) ("The United States has set up a system of national banks as federal instrumentalities to perform various functions"). As this Court has noted, for over a century, in matters of interest and usury, " 'National banks . . . have been National favorites.' " *Marquette,* 434 U.S. at 314, quoting *Tiffany v. National Bank*, 85 U.S. 409, 413 (1873).

Because the National Bank Act not only preempts state law usury claims, but also provides the exclusive remedy for claims of usury against national banks, the statute's "preemptive force" is powerful enough to "displace entirely any state cause of action" for usury. *Franchise Tax,* 463 U.S. at 23. Thus, under this Court's precedents, the National Bank Act completely preempts state law usury claims against national banks, thereby providing a basis for removal jurisdiction in this case.

C. The Majority's Test for Complete Preemption, Which Requires a Showing of Explicit Congressional Intent to Permit Removal, is Inappropriate.

In the present case, the majority panel for the Eleventh Circuit based its conclusion that the National Bank Act does not completely preempt respondents' state law usury claims on an absence of legislative history confirming that the drafters of the National Bank Act intended for

cases alleging usurious interest to be removable to federal court. 287 F.3d at 1047 (Appendix at p. 17a). However, as discussed above, in neither *Avco* nor in this Court's later characterization of that decision in *Franchise Tax* did this Court discuss Congress's intent in passing the LMRA or state that complete preemption is dependent upon explicit evidence of congressional intent to permit removal. Instead, the Court found that complete preemption supported removal jurisdiction in *Avco* because, in the Court's view, "the preemptive force of § 301 is so powerful as to displace entirely any state cause of action" that comes within the purview of the federal statute. *Franchise Tax,* 463 U.S. at 23. Similarly, in *Metropolitan Life*, while this Court noted that absent an "explicit direction from Congress, this question would be a close one," 481 U.S. at 64, this Court did not state that a specific congressional intent to permit removal was a prerequisite to a finding of complete preemption. It simply found that in that case, there was such an explicit direction from Congress, including an express statement by Congress in the legislative history that the statute involved should be treated the same as the statute at issue in the *Avco* case. *Metropolitan Life*, 481 U.S. at 66.

The majority's requirement of an explicit showing of Congressional intent to authorize removal in the legislative history of the statute is not only not required by this Court's precedents, but it is also futile with a statute such as the National Bank Act, given that the statute was written by Congress in 1864, long before the general removal statute, the well-pleaded complaint rule or the complete preemption doctrine were enunciated. We could therefore not expect the Congress that enacted the National Bank Act to have discussed federal question jurisdiction or

the removal implications of §§ 85 and 86, since neither general federal question jurisdiction nor general removal power existed in 1864. Under these circumstances, the majority of the Eleventh Circuit's requirement of an explicit showing of congressional intent to permit removal is inappropriate.

CONCLUSION

For the foregoing reasons, this Court should grant Block's petition for writ of certiorari.

Respectfully submitted,

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287 F.3d 1038

United States Court of Appeals,
Eleventh Circuit.

Marie ANDERSON, Alvester Brafort, et al.,
Plaintiffs-Appellants,

v.

H&R BLOCK, INC., Beneficial National Bank, et al.,
Defendants-Appellees.

No. 01-11863.

April 3, 2002.

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Appeal from the United States District Court for the Middle District of Alabama.

Before TJOFLAT, BARKETT and WILSON, Circuit Judges.

WILSON, Circuit Judge:

The issue we decide on this appeal is whether the plaintiffs' state-law usury claims are completely preempted by the National Bank Act (NBA), 12 U.S.C. §§ 85 and 86, and therefore properly removable to federal court. Although the plaintiffs alleged only state-law claims in

their complaint, the district court determined that it had jurisdiction based on the doctrine of complete preemption. We disagree and reverse.

BACKGROUND

The plaintiffs, who as customers of H&R Block, Inc. had taken out tax refund anticipation loans[1] from Beneficial National Bank, brought suit in state court against H&R Block, Beneficial National Bank, and Beneficial Tax Masters, Inc., alleging usury violations[2] along with other state-law claims. The defendants removed the case to federal court on the basis of federal question jurisdiction. The defendants argued that since the NBA provides the exclusive remedy for claims alleging excessive interest against national banks, the plaintiffs' state-law usury claims should be recharacterized as federal claims under the doctrine of complete preemption. The plaintiffs moved to remand the case back to state court, arguing that while §§ 85 and 86 of the NBA may provide a defense to state-law usury claims, these provisions do not accomplish complete preemption. The district court denied the motion to remand, holding that removal was proper because

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[1] In a tax refund anticipation loan, a customer receives the amount of her anticipated tax refund, less fees charged by the lender and the tax preparation service, and in return authorizes the government to deposit the tax refund directly into an account at the bank to repay the loan.

[2] The plaintiffs alleged that the defendants charged excessive interest in violation of Alabama Code § 8-8-1 and the common-law usury doctrine. In addition to the usury claims, the complaint included claims for intentional misrepresentation, suppression of material facts, and breach of fiduciary duty.

federal question jurisdiction existed based on complete preemption. Recognizing that the issue was unsettled in this Circuit, the district court certified for interlocutory appeal the question of whether §§ 85 and 86 of the NBA completely preempt state-law usury claims so as to confer removal jurisdiction. We hold that these sections do not accomplish complete preemption.

DISCUSSION

The question of whether §§ 85[3] and 86[4] of the NBA completely preempt state-law usury claims against a national bank has been the subject of disagreement among other circuits and among district courts within this Circuit.[5] What is at stake in this inquiry is whether §§ 85 and

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[3] Section 85 provides, "Any [national bank] may take, receive, reserve, and charge on any loan or discount made . . . interest at the rate allowed by the laws of the State . . . where the bank is located . . . ." 12 U.S.C. § 85.

[4] Section 86 provides,

> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred.

12 U.S.C. § 86.

[5] While the Eighth Circuit has held that § 86 completely preempts state-law usury claims, *M. Nahas & Co. v. First Nat'l Bank of Hot*

(Continued on following page)

86 not only provide a defense to state-law usury claims under ordinary preemption, but also confer on defendants the ability to remove the case from state to federal court under the complete preemption doctrine. For the reasons that follow, we hold that §§ 85 and 86 do not accomplish complete preemption. We begin by describing the complete preemption doctrine and analyzing how the doctrine has been applied by the Supreme Court and this Court. Our analysis reveals that the complete preemption inquiry turns on congressional intent – whether Congress not only intended for a federal statute to provide a defense to state-law claims, but also intended to confer on defendants the ability to remove a case to a federal forum. We conclude that §§ 85 and 86 of the NBA do not accomplish the extraordinary result of complete preemption, because clear congressional intent to permit removal under these sections is lacking.

Springs, 930 F.2d 608, 612 (8th Cir.1991), the Third Circuit disagreed in *Spellman v. Meridian Bank*, 3d Cir.1996, 1995 WL 764548 (Nos. 94-3203, 94-3204, 94-3215 to 94-3218, Jan. 12, 1996), *Rehearing in Banc Granted, Opinion Vacated* (Feb. 16, 1996). After the Third Circuit vacated the panel decision and ordered a rehearing en banc, the parties settled and the complete preemption issue was left undecided. 14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3722.1, at 557 (3d ed.1998).

Within this Circuit, district courts also have reached different results. *Compare Monday v. Coast to Coast Wireless Cable*, M.D. Ala.1997, 1997 WL 114874 (Nos. CV-96-A-1321-N, CV-96-A-1539-N, CV-96-A-1720-N, CV-96-A-1722-N, CV-96-A-1723-N, CV-96-A-1725-N, Feb. 19, 1997) (holding §§ 85 and 86 completely preempt state-law claims within their scope), *with Jones v. Bankboston, N.A.*, 115 F.Supp.2d 1350, 1356-58, 1360 (S.D.Ala.2000) (reaching the opposite conclusion).

I

Whether a district court may exercise jurisdiction over this case based on complete preemption is a question of law that we review de novo. *BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc.*, 182 F.3d 851, 854 (11th Cir.1999). As courts of limited jurisdiction, lower federal courts may decide a case only when Article III of the Constitution provides that the federal judicial power extends to the case and when Congress has granted jurisdiction. *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409 (11th Cir.1999). When a federal court acts outside its jurisdiction, it violates principles of separation of powers and federalism, interfering with Congress's authority to demarcate the jurisdiction of lower federal courts, and with the states' authority to resolve disputes in their own courts. *Id.* at 409-10. For this reason, when there are doubts as to whether removal jurisdiction is proper, we favor remand of removed cases. *Id.* at 411.

The removal statute, 28 U.S.C. § 1441(a), provides that any civil action brought in state court may be removed to federal court by the defendant as long as the federal court has jurisdiction in the case. Removal based on federal question jurisdiction, the grounds for removal the district court found here, generally is governed by the "well-pleaded complaint" rule, which provides that a case may be removed only if the plaintiff's properly pleaded complaint reveals that the claim is based on federal law. *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 9-10, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). Under the well-pleaded complaint rule, a case in which the plaintiff asserts only state-law claims may not be removed to federal court based on the

existence of a federal defense – even the defense of ordinary preemption. *Caterpillar Inc. v. Williams,* 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). "Congress has long since decided that federal defenses do not provide a basis for removal." *Id.* at 399, 107 S.Ct. 2425.

An exception to the well-pleaded complaint rule is the "complete preemption" doctrine. *BLAB T.V.,* 182 F.3d at 854. Under this doctrine, a defendant may remove a case to federal court even though the plaintiff raises only state-law claims in her complaint, when "the pre-emptive force of a [federal] statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule."[6] *Caterpillar Inc.,* 482 U.S. at 393, 107 S.Ct. 2425 (internal quotation marks omitted).

The Supreme Court has found complete preemption under two federal statutes – section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, and section 502(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a). *BLAB T.V.,* 182 F.3d at 855. The complete preemption doctrine was born with little elaboration or explanation in *Avco Corp. v. Aero*

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[6] We have recognized that the doctrine of complete preemption often is confused with the defense of ordinary federal preemption. *BLAB T.V.,* 182 F.3d at 854-55. Ordinary preemption is a defense that may be raised in state court as well as in federal court. *Id.* at 855. As a defense, ordinary preemption does not appear in the plaintiff's well-pleaded complaint, and thus does not give the defendant the ability to remove a case to federal court. *Caterpillar Inc.,* 482 U.S. at 393, 107 S.Ct. 2425. Unlike the defense of ordinary preemption, the doctrine of complete preemption gives a defendant the ability to remove the case to federal court. *BLAB T.V.,* 182 F.3d at 854.

Lodge Number 735, International Association of Machinists and Aerospace Workers, 390 U.S. 557, 560-62, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968), where the Supreme Court treated the plaintiff's state-law claim based on a collective bargaining agreement as a federal claim arising under section 301 of the LMRA, and held that the case was properly removed to federal court. The Supreme Court had not yet begun to use the term "complete preemption" to describe this result, and *Avco* provides little guidance on the scope of the complete preemption doctrine.[7]

The Supreme Court provided more guidance on the contours of the complete preemption doctrine when it cautiously extended the doctrine to section 502(a) of

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[7] Karen A. Jordan, in *The Complete Preemption Dilemma: A Legal Process Perspective,* 31 Wake Forest L.Rev. 927, 951 (1996), remarked that the Supreme Court in *Avco* "provided limited insight into the justification for its holding," since the Court "did not mention the well-pleaded complaint rule, nor did it explain why this case fell outside that rule." The Court explained the *Avco* decision in *Franchise Tax Board,* stating, "The necessary ground of decision was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization. Any such suit is purely a creature of federal law . . . ." 463 U.S. at 23, 103 S.Ct. 2841 (footnote omitted) (internal quotation marks omitted).

Some courts describe as another example of complete preemption the Supreme Court's decision in *Oneida Indian Nation of New York State v. Oneida County,* 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) (agreeing with the Oneida Indian Nation that federal question jurisdiction existed over its right-to-possession claim because the possessory rights of Indian tribes necessarily arise under federal law and treaties). *BLAB T.V.,* 182 F.3d at 855 n. 2. *Oneida Indian Nation,* like *Avco,* does not use the term "complete preemption" and provides little guidance on when a court should or should not apply the complete preemption doctrine.

ERISA in *Metropolitan Life Insurance Co. v. Taylor,* 481 U.S. 58, 64-67, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). The Court said that without clear indications that Congress intended to permit removal of state claims that fell within the scope of ERISA's civil enforcement provision in section 502(a), the Court would have been "reluctant" to expand the "extraordinary pre-emptive power" recognized by the *Avco* decision under section 301 of the LMRA. *Id.* at 65, 107 S.Ct. 1542. After examining section 502(a), however, the Court did find clear indications of congressional intent to permit removal – explicit statements in the legislative history that Congress meant for this provision to be construed in the same fashion as section 301 of the LMRA, and close parallels between the jurisdictional subsection of ERISA's civil enforcement provision and section 301 of the LMRA. *Id.* at 65-66, 107 S.Ct. 1542. Because Congress "clearly manifested an intent to make [these] causes of action . . . removable to federal court," the Supreme Court felt bound to "honor that intent" and find complete pre-emption. *Id.* at 66, 107 S.Ct. 1542.

Outside the contexts of the LMRA and ERISA, this Court has addressed the question of complete preemption only twice, in *Smith v. GTE Corp.,* 236 F.3d 1292, 1310-13 (11th Cir.2001) (holding that the Federal Communications Act did not accomplish complete preemption), and *BLAB T.V.,* 182 F.3d at 857-59 (holding that the Cable Communications Policy Act did not accomplish complete preemption). In those cases, we recognized that the complete preemption doctrine should be carefully limited in scope. We noted that "although the Supreme Court recognizes the existence of the complete preemption doctrine, the Court does so hesitatingly and displays no enthusiasm to extend the doctrine into areas of law beyond the LMRA

and ERISA." *Id.* at 856. We recognized that the Supreme Court only "reluctant[ly]" extended the complete preemption in *Taylor,* based on "virtually identical" jurisdictional provisions in the LMRA and ERISA and explicit statements in the legislative history of ERISA that the two statutes should be construed in a like manner. *Id.* at 855 (alteration in original) (internal quotation marks omitted). Finding no similar clear manifestation of congressional intent to permit removal in *BLAB T.V.* or *Smith,* we held that the complete preemption doctrine did not create federal jurisdiction in those cases. *Smith,* 236 F.3d at 1313; *BLAB T.V.,* 182 F.3d at 858.

In determining whether Congress intends for a federal statute to completely preempt state-law claims, courts consider a variety of factors such as "whether the state claim is displaced by federal law under an ordinary preemption analysis, whether the federal statute provides a cause of action, what kind of jurisdictional language exists in the federal statute, and what kind of language is present in the legislative history to evince Congress's intentions." *BLAB T.V.*, 182 F.3d at 857. While we have declined to adopt a specific test for this Circuit, we recognize that all of these tests have the same ultimate goal:

> "to determine whether Congress not only intended a given federal statute to provide a federal defense to a state cause of action that could be asserted either in a state or federal court, but *also intended to grant a defendant the ability to remove* the adjudication of the cause of action to a federal court by transforming the state cause of action into a federal [one]."

Id. (emphasis added) (alteration in original) (quoting Arthur R. Miller, *Artful Pleading: A Doctrine in Search of*

Definition, 76 Tex. L.Rev. 1781, 1797-98 (1998)). In sum, both the Supreme Court and this Court have recognized that the "touchstone" of the complete preemption inquiry is congressional intent. *Taylor,* 481 U.S. at 66, 107 S.Ct. 1542; *BLAB T.V.,* 182 F.3d at 857.

II

Since congressional intent is the pivotal issue in the complete preemption inquiry, that is where we must focus our analysis of whether §§ 85 and 86 of the NBA completely preempt state-law usury claims against a national bank. In enacting the NBA, did Congress merely intend for federal law to act as a defense to state-law usury claims against a national bank under ordinary preemption – a defense that just as well could be asserted in state court and applied by state judges? Or did Congress intend that national banks facing usury claims in state court should have the ability to remove the case to a federal forum?

The defendants argue that it would be impossible for a court to find in the NBA the striking indications of congressional intent to permit removal through complete preemption that the Supreme Court relied on in *Taylor,* because the NBA was enacted more than a decade before Congress gave federal courts general federal question jurisdiction, more than two decades before the development of the well-pleaded complaint rule, and more than a century before the articulation of the complete preemption

doctrine.[8] Nonetheless, the defendants argue that applying the complete preemption doctrine here would be consistent with Congress's purposes because the historical context of the NBA indicates that Congress was suspicious of state interference with national banks.

The NBA was enacted in 1864[9] in the midst of economic strife during the Civil War. The defendants cite to many statements in the congressional debates surrounding the enactment of the NBA that show Congress's intent to protect the new national banks from unfriendly state legislation. For example, Representative Samuel Hooper of Massachusetts argued that the NBA was necessary so "the currency of the country may be within the control and regulation of a national law applicable to the whole country, instead of being controlled and regulated by State law as it has been heretofore," and stated, "I appeal to the

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[8] The Judiciary Act of 1875 gave lower federal courts general federal question jurisdiction and general removal jurisdiction in civil cases arising under the Constitution or federal law. Donald H. Zeigler, *Twins Separated at Birth: A Comparative History of the Civil and Criminal Arising Under Jurisdiction of the Federal Courts and Some Proposals for Change,* 19 Vt. L.Rev. 673, 735-37 (1995). Between 1875 and 1887, when the Act was amended, "the well-pleaded complaint rule was not applied in full force to cases removed from state court; the defendant's petition for removal could furnish the necessary guarantee that the case necessarily presented a substantial question of federal law." *Franchise Tax Bd.,* 463 U.S. at 10 n. 9, 103 S.Ct. 2841. However, since 1887, "[f]or better or for worse . . . a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case 'arises under' federal law." *Id.* at 10, 103 S.Ct. 2841.

[9] Act of June 3, 1864, 13 Stat. 99 (repealing and superseding the similar Act of Feb. 25, 1863). The Act originally was titled "An Act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," but its title was changed in 1874 to "The National Bank Act." 12 U.S.C. § 38.

members of the House, and I ask them if they can excuse themselves to their constituents and to posterity if they sacrifice the great interests that are now at stake to the comparatively petty interest of local banking." Cong. Globe, 38th Cong., 1st Sess. 1451 (1864). Based on statements like this from the congressional debates, the defendants ask us to adopt the reasoning of Judge Anthony J. Scirica in his dissent in *Spellman v. Meridian Bank,* 3d Cir.1996, 1995 WL 764548 (Nos. 94-3203, 94-3204, 94-3215 to 94-3218, Jan. 12, 1996) (Scirica, J., dissenting), *Rehearing in Banc Granted, Opinion Vacated* (Feb. 16, 1996): that Congress clearly intended that the NBA alter federal state relations and protect national banks from state interference, and therefore the NBA completely preempts state law because "'Congress intended to have usury claims against national banks governed by a body of federal law which the federal courts would apply.'" 14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3722.1, at 557 (3d ed.1998) (quoting *Spellman,* 1995 WL 764548, at *24 (Scirica, J., dissenting)).

While the congressional debates amply demonstrate Congress's desire to protect national banks from state legislation, they do not demonstrate that Congress desired to protect national banks from facing suit in state court. *Jones v. Bankboston, N.A.,* 115 F.Supp.2d 1350, 1360 (S.D.Ala.2000) (acknowledging that the NBA was meant to protect against "unfriendly legislation by the States," but stating that "the evidence does not demonstrate . . . that Congress was so distrustful of the states' *judicial* systems"). Even before 1875, when Congress gave lower federal courts original federal question jurisdiction and general removal jurisdiction, Congress had provided in a

handful of specific acts that federal law would both provide a defense and allow for removal from state to federal court.[10] When Congress enacted the NBA in 1864, it provided that suit could be brought in federal or state court, and it did not provide for removal.[11] Four years later, in the Act of July 27, 1868, Congress allowed for corporations organized under federal law to remove a case from state to federal court by filing a petition that they had a defense arising under federal law – but by amendment, Congress excepted national banks from this removal power. 15 Stat. 226-27 ("*And be it further enacted,* That any corporation, or any member thereof, *orther* [other] than a banking corporation, organized under a law of the

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[10] For instance, in the Act of March 3, 1863, 12 Stat. 755 (amended by the Act of May 11, 1866, 14 Stat. 46), Congress provided for a federal defense and provided the right of removal of civil or criminal actions arising out of acts committed under federal authority during the Civil War. *See Mayor & Aldermen of City of Nashville v. Cooper*, 73 U.S. (6 Wall.) 247, 251, 18 L.Ed. 851 (1867); Michael G. Collins, *The Unhappy History of Federal Question Removal,* 71 Iowa L.Rev. 717, 720-21 (1986). The pre-1875 removal statutes are collected in Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 61-62 n. 22 (1927), and discussed in Stanley I. Kutler, *Judicial Power and Reconstruction Politics* 143-60, 168 (1968).

[11] Although the 1863 Act provided for suit in federal court and did not mention state court, *see Mercantile Nat'l Bank at Dallas v. Langdeau,* 371 U.S. 555, 558-59, 83 S.Ct. 520, 9 L.Ed.2d 523 (1963), when Congress replaced the 1863 Act in 1864, section 57 of the Act provided for suit in either federal or state court: " '[S]uits, actions and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases. . . . ' " *Id.* at 568, 83 S.Ct. 520 (quoting 13 Stat. 116-17).

United States, and against which a suit at law or in equity has been or may be commenced in any court other than a circuit or district court of the United States, for any liability or alleged liability of such corporation, or any member thereof as such member, may have such suit removed from the court in which it may be pending, to the proper circuit or district court of the United States, upon filing a petition therefor, verified by oath, either before or after issue joined, stating they have a defence arising under or by virtue of the Constitution of the United States, or any treaty or law of the United States . . . ." (alteration in original)). *See also* Cong. Globe, 40th Cong., 2d Sess. 4197-98 (1868); 7 Charles Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88, Part Two,* 394-97 (1987). This legislative history compels us to reject the defendants' suggestion that the early history of national banks offers clear congressional intent to make claims under the NBA removable.

Since both the Supreme Court and this Court have recognized that congressional intent is the "touchstone" in the complete preemption inquiry, we also must reject the line of cases which have found complete preemption without inquiring into Congress's intent. The only circuit court opinions that are consistent with this suggestion are *M. Nahas & Co. v. First National Bank of Hot Springs,* 930 F.2d 608, 612 (8th Cir.1991), and *Krispin v. May Department Stores Co.,* 218 F.3d 919, 922 (8th Cir.2000), which follows the *M. Nahas & Co.* reasoning. Without examining congressional intent, the Eighth Circuit found complete preemption in *M. Nahas & Co.* based solely on

well-settled law that § 86 provides the exclusive remedy for usury claims against a national bank.[12] 930 F.2d at 612. However, in *Jones,* Chief District Judge Charles R. Butler, Jr. criticized the Eighth Circuit's lenient complete preemption standard as inconsistent with Supreme Court and Eleventh Circuit precedent and held that the NBA did not completely preempt state-law usury claims so as to allow for removal. 115 F.Supp.2d at 1361. We consider *Jones* to be a sound application of the principles reflected in the complete preemption cases decided by the Supreme Court and this Court, and we take a similar approach here.

In *Jones,* the court concluded that the sole justification the *M. Nahas & Co.* holding – that § 86 provides the exclusive remedy for usury claims against a national bank – was not by itself sufficient to establish complete preemption. *Id.* at 1355-56. The court in *Jones* arrived at this conclusion by examining the Supreme Court's analysis in *Taylor,* where before beginning its complete preemption inquiry, the Supreme Court acknowledged that ERISA

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[12] Federal law governs the amount of interest a national bank may charge, *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.,* 439 U.S. 299, 308, 99 S.Ct. 540, 58 L.Ed.2d 534 (1978), and provides the exclusive remedy for usury claims against a national bank, *McCollum v. Hamilton Nat'l Bank of Chattanooga,* 303 U.S. 245, 247, 58 S.Ct. 568, 82 L.Ed. 819 (1938); *Evans v. Nat'l Bank of Savannah,* 251 U.S. 108, 109, 40 S.Ct. 58, 64 L.Ed. 171 (1919); *Farmers' & Mechanics' Nat'l Bank v. Dearing,* 91 U.S. 29, 32, 23 L.Ed. 196 (1875). But this does not provide an answer to the complete preemption inquiry – "'[C]omplete preemption principally determines not whether state or federal law governs a particular claim, but rather whether that claim will, irrespective of how it is characterized by the complainant, [serve as the basis for federal question jurisdiction].'" *BLAB T.V.,* 182 F.3d at 855 (alteration in original) (quoting *McClelland v. Gronwaldt,* 155 F.3d 507, 517 (5th Cir.1998)).

preempted the plaintiff's state-law claims and provided an alternative federal remedy. *Id.* at 1356 (citing *Taylor,* 481 U.S. at 64, 107 S.Ct. 1542). "Were the existence of an 'exclusive federal remedy' the only requirement for complete preemption, the . . . Court would have concluded its analysis at this point and declared the plaintiff's claims completely preempted." *Id.* However, the *Taylor* Court went on to say that it would be "reluctant" to find complete preemption on this basis alone. 481 U.S. at 65, 107 S.Ct. 1542. The *Taylor* Court then conducted a searching inquiry into congressional intent, focusing on the parallels to the LMRA and explicit statements in the legislative history that ERISA should be construed like the LMRA to find Congress had "clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court." *Id.* at 66, 107 S.Ct. 1542. The *Jones* court concluded – and we agree – that the analysis in *Taylor* indicates that where there are no further indications of congressional intent to permit removal, the existence of an exclusive federal remedy generally will not be enough to achieve complete preemption. 115 F.Supp.2d at 1356.

The *Jones* court also noted that this Court uses a more demanding standard for complete preemption than the Eighth Circuit used in *M. Nahas & Co. Id.* at 1355-56. "[T]he only justification offered by the *Nahas* Court for its ruling was that the National Bank Act accomplishes 'ordinary' preemption of state law claims for excessive interest and provides an alternative federal cause of action for the preempted state claim." *Id.* at 1355. We previously have recognized that the mere provision of a federal cause of action cannot be dispositive in the complete preemption inquiry:

> If the creation of a federal cause of action served as the sole litmus test for congressional intent, complete preemption would apply to every federal statute that creates such a cause of action and complete preemption would be common rather than extraordinary .... Congress may create a federal cause of action without also providing sufficient evidence of its intent that state causes of action are to be considered as arising under the federal statute and thus removable to federal court.

BLAB T.V., 182 F.3d at 859 n. 3. Our precedent demands clear congressional intent to permit removal. Like the Supreme Court, we have not yet extended the complete preemption doctrine beyond section 301 of the LMRA and section 502(a) of ERISA. We cannot extend the complete preemption doctrine here, where clear congressional intent to permit removal is lacking.

CONCLUSION

Under our federal system, both state and federal courts are entrusted to faithfully follow federal law. *Pub. Serv. Comm'n of Utah v. Wycoff Co.,* 344 U.S. 237, 247-48, 73 S.Ct. 236, 97 L.Ed. 291 (1952) ("State courts are bound equally with the federal courts by the Federal Constitution and laws."). State courts in Alabama – the forum from which the defendants sought removal – have a long history of faithfully applying the NBA. *E.g., Lowery v. First Nat'l Bank of Oneonta,* 239 Ala. 690, 196 So. 891, 892 (1940) ("The penalties imposed upon a national bank for charging a higher rate of interest than allowed by the law of the state where located are fixed by the Federal Banking Law."); *Florence R.R. & Improvement Co. v. Chase Nat'l Bank,* 106 Ala. 364, 17 So. 720, 721 (Ala.1895) ("[T]he

penalty prescribed by the national banking statute for usurious discounting paper by national banks is exclusive, and those imposed by state statutes cannot be applied and enforced."); *Helms v. First Ala. Bank of Gadsden, N.A.*, 386 So.2d 450, 452 (Ala.Civ.App.1980) ("[S]ince Congress has provided the penalty for usury [with § 86], that action preempts the field, leaving no room for varying state penalties.").

Because state courts, like federal courts, are competent in determining when state-law claims are preempted by federal law, removal to a federal forum based on the doctrine of complete preemption has been the exception, not the rule. Recognizing that the complete preemption doctrine works to trump the well-pleaded complaint rule as well as the maxim that a plaintiff is the master of the complaint and may avoid a federal forum by relying exclusively on state law, the Supreme Court expanded the doctrine only "hesitatingly" when there was a clear showing of congressional intent to permit removal. *BLAB T.V.*, 182 F.3d at 856. Since we find no clear congressional intent to permit removal under §§ 85 and 86 of the NBA, we therefore hold that while these sections may provide a defense to state-law usury claims, they do not accomplish complete preemption so as to permit removal.

We therefore REVERSE the district court's order denying the plaintiffs' motion to remand and REMAND to the district court for further proceedings consistent with this opinion.

TJOFLAT, Circuit Judge, dissenting:

The majority decides today that the provisions in the National Bank Act ("NBA") addressing usurious interest,

12 U.S.C. §§ 85 and 86, do not completely preempt plaintiffs' state law claims, and, as a result, the claims are not removable to federal court. The majority bases this conclusion on an absence of legislative history confirming that the NBA's drafters intended that cases of usurious interest be heard and decided in a federal forum. I do not disparage the majority's emphasis on congressional intent as the touchstone of complete preemption analysis. Rather, I take issue with the majority's narrow conception of congressional intent as something only inferable from an enactment's legislative history, here the NBA's. Sometimes Congressional intent is determined by looking to statutes already on the books.[1] In this case, I suggest that the Judiciary Act of 1789 ("Judiciary Act" or "Act"), ch. 20, § 9, 1 Stat. 76-77 (1789), is highly relevant in determining whether the drafters of the NBA intended that lawsuits seeking relief from usurious interest rates, which is what the plaintiffs seek here, be litigated in a federal forum.

The Judiciary Act, enacted by the first Congress, established the federal judiciary. It created thirteen

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[1] "We do not start from the premise that [the statutory] language is imprecise. Instead, we assume that in drafting this legislation, Congress said what it meant." *United States v. LaBonte*, 520 U.S. 751, 757, 117 S.Ct. 1673, 1677, 137 L.Ed.2d 1001 (1997). Likewise, our own precedent directs us to "begin our construction of [a statutory provision] where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision." *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir.2000) (en banc). Legislative history is an oft-used and important tool in the task of statutory interpretation when ambiguities exist in the language. Still, "[w]hen the import of words Congress has used is clear . . . we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language." *Id.* at 976.

judicial districts, which became the organizational units of the lower federal courts. The degree of precision in language employed by the drafters of the Act indicates that they had a strong understanding of jurisdictional principles and their role in case management and development of the law. For some federal causes, they gave exclusive jurisdiction to the federal courts; for others, they provided that the district courts would have concurrent jurisdiction with the state courts.[2] Where the drafters saw the need for uniformity of decision or avoidance of state interference, they gave the district courts exclusive jurisdiction. "[S]uits for penalties and forfeitures incurred, under the laws of the United States" were put squarely in that category. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 76-77 (1789).

We must assume that Congress was well aware of this provision – in particular, the word "forfeiture" – when, seventy-four years later, in the midst of the Civil War, it enacted the NBA. Section 85, as reproduced by the majority in note four, defines usurious interest by relying on specific discount commercial paper rates or state rates. Section 86 provides a cause of action for a debtor who was wrongly charged, or who has already paid, such interest on a loan. Although the majority duplicated section 86 in note five, it is useful to do so again for purposes of focusing on the specific language employed:

> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section

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[2] For example, concurrent jurisdiction was provided with respect to "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act, ch. 20, § 9(b), 1 Stat. 77 (1789).

> 85 of this title, when knowingly done, shall be deemed a *forfeiture* of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid . . . may recover back, in an action in the nature of an action of debt, *twice the amount of the interest thus paid.*

12 U.S.C. § 86 (emphasis added). In sum, section 86 furnishes a victim of usurious interest two possible remedies: (1) the victim can obtain a judgment declaring *forfeiture* of the entire interest of the debt if usurious interest is sought; or (2) if such interest has already been paid, the victim may bring a suit to recover twice the amount collected as a *penalty* to the lender.

In the case before us, the plaintiffs claim that Beneficial National Bank, a national banking association, charged them usurious interest rates on tax refund anticipation loans. Plaintiffs' allegations are so unspecific that it is difficult to say whether the plaintiffs are seeking the forfeiture of the interest they are being charged or whether they are seeking twice the amount of interest they have paid or whether they are pursuing both remedies. I say this because there are twenty-six plaintiffs and the complaint does not tell us, with respect to any of the plaintiffs, (1) when the loan was made, (2) the terms of the loan, and (3) the status of the loan – that is, whether the plaintiff had paid any interest, and if so, how much, prior to filing suit. I assume that the plaintiffs' loans have not been paid in full. Therefore, to the extent they have paid interest, they are seeking, in the words of section 86, "twice the amount of the interest paid" and "forfeiture" of the amount still due.

The only way to avoid the operation of the Judiciary Act's mandate that "suits for penalties and forfeitures incurred" be filed in federal court is to say that the NBA amended that mandate by implication.[3] In light of our statement in *Patel v. Quality Inn South,* 846 F.2d 700, 704 (11th Cir.1988), that "amendments by implication are disfavored," I suggest that this method of avoiding the Judiciary Act's mandate is unavailable, and that the Act's mandate should therefore dictate our decision.[4]

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[3] Although the majority does not mention the Judiciary Act "suits for penalties and forfeitures" provision, and therefore does not discuss whether the NBA amended that provision by implication, the majority does say that the reference to state courts in the NBA's "Venue of suits" provision forecloses the argument that the federal courts have exclusive jurisdiction of a claim of usury.

[4] That the majority has not considered the application of the Judiciary Act in this case is not surprising. As far as I know, no court faced with the jurisdiction issue we are deciding has considered the relevance of the Judiciary Act provision I rely on here. *See e.g., Spellman v. Meridian Bank,* 1995 WL 764548 (Nos. 94-3203, 94-3402, 94-3215 to 94-3218) (3d Cir.1996) (vacated on grant of rehearing en banc then appeal dismissed by parties after settlement); *M. Nahas. & Co. v. First. Nat'l Bank,* 930 F.2d 608 (8th Cir.1991); *Jones v. Bankboston, NA.,* 115 F.Supp.2d 1350 (S.D.Ala.2000).

132 F.Supp.2d 948

United States District Court,
M.D. Alabama,
Northern Division.

Marie ANDERSON, et al., Plaintiffs,

v.

H & R BLOCK, INC.; Beneficial National Bank; and Beneficial Tax Masters, Inc., Defendants.

No. CIV.A.00-A-1457-N.

Dec. 14, 2000.

Walter B. Calton, John P. Hagood, Calton Rutland & Hagood, LLC, Eufaula, K. Stephen Jackson, Jeffrey S. Daniel, Jackson, Fraley & Shuttlesworth, PC, Birmingham, AL, for Marie Anderson, Alvester Brafort, Walter Brutley, Patricia Coleman, Talaya Cope, Audrey Darby, Annie Davis, April Deloach, Diane Franklin, Lillie Franklin, Willie Lewis, Caledonia Jackson, Shirley Jernigan, Evelyn Nelson, Willie Lawrence, Mamie Mitchell, Betty Person, Diane Peterson, Gwen Rogers, Williams [sic] Screws, Ernestine Starks, Gerald Stokes, Albert Thomas, Charles Thomas, Kenneth Williams, Earline Young, plaintiffs.

Peter S. Fruin, Maynard, Cooper & Gale, P.C., Montgomery, AL, A. Inge Selden, III, Stephen C. Jackson, Carl Stanley Burkhalter, Maynard, Cooper & Gale, P.C., Birmingham, AL, for H & R Block, Inc.

Stewart M. Cox, Hope T. Stewart, Bradley, Arant, Rose & White, LLP, Birmingham, AL, Alan S. Kaplinsky, Burt M. Rublin, Edward D. Rogers, Ballard, Spahr, Andrews & Ingersoll, Philadelphia, PA, Brian P. Strength, Bradley Arant Rose & White, LLP, Montgomery, for

Beneficial National Bank, Beneficial Tax Masters, Inc., defendants.

MEMORANDUM OPINION AND ORDER

ALBRITTON, Chief Judge.

I. *INTRODUCTION*

This cause is now before the court on a Motion to Remand, filed by the Plaintiffs, Marie Anderson, Alvester Brafort, Walter Brutley, Patricia Coleman, Talaya Cope, Audrey Darby, Annie Davis, April DeLoach, Diane Franklin, Lillie Franklin, Willie Lewis, Caledonia Jackson, Shirley Jernigan, Evelyn Nelson, Willie Lawrence, Mamie Mitchell, Betty Person, Diane Peterson, Gwen Rogers, William Screws, Ernestine Starks, Gerald Stokes, Albert Thomas, Charles Thomas, Kenneth Williams, and Earline Young ("Plaintiffs") on November 22, 2000.

The Plaintiffs originally filed a Complaint against H & R Block, Inc.; Beneficial National Bank; and Beneficial Tax Masters, Inc. in the Circuit Court of Barbour County, Alabama. The Complaint alleges counts of intentional misrepresentation (Court [sic] One); suppression of material facts (Count Two); breach of fiduciary duty (Count Three); usury violations (Count Four); and Alabama Code Violations (Count Five).

H & R Block, Inc. ("H & R Block"), and Beneficial National Bank and Beneficial Tax Masters (collectively "Beneficial") filed a Notice of Removal in this court on October 24, 2000. Removal was based upon the presence of a federal question through complete pre-emption under the National Bank Act ("NBA"). The Plaintiffs state they

have asserted only state law claims and contest that the NBA completely pre-empts these claims.

For the reasons herein discussed, the Motion to Remand is due to be DENIED.

II. *FACTS*

The Plaintiffs' claims arise out of representations made and interest and fees charged in connection with loans made to them through H & R Block by Beneficial. According to Beneficial, these loans were tax refund anticipation loans which are loans made to a tax return preparation service by a bank in the amount of the customer's anticipated tax refund, less the fees charged by the lender and the tax preparation service.

The Plaintiffs allege that the Defendants charged each of them interest in excess of the legal limit on interest rates allowed under Alabama law and the common law doctrine of usury. The Plaintiffs also allege that the Defendants misrepresented and failed to disclose the interest rate and the fees that would be charged, and breached their fiduciary duties to the Plaintiffs.

III. *REMAND STANDARD*

Federal courts are courts of limited jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 114 S.Ct. 1673, 1675, 128 L.Ed.2d 391 (1994); *Burns v. Windsor Insurance Co.*, 31 F.3d 1092, 1095 (1994); *Wymbs v. Republican State Executive Committee*, 719 F.2d 1072, 1076 (11th Cir.1983), *cert. denied*, 465 U.S. 1103, 104 S.Ct. 1600, 80 L.Ed.2d 131 (1984). As such, federal courts have

the power only to hear cases that they have been authorized to hear by the Constitution or the Congress of the United States. *See Kokkonen,* 114 S.Ct. at 1675. Because federal court jurisdiction is limited, the Eleventh Circuit favors remand of removed cases where federal jurisdiction is not absolutely clear. *See Burns,* 31 F.3d at 1095.

IV. *DISCUSSION*

Removal of a case to federal district court by a defendant is only proper if the case brought by the plaintiff in state court originally could have been brought in federal court. *See* 28 U.S.C. § 1441(a). In this case, Beneficial and H & R Block argue that the court has jurisdiction over the Plaintiffs' claims because of the presence of a federal question. Federal question jurisdiction requires that the action arise under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. In deciding whether a federal question exists, the court must apply the well-pleaded complaint rule whereby the court looks to the face of the complaint, rather than to any defenses asserted by the defendant. *See Caterpillar, Inc. v. Williams,* 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Consequently, the general rule is that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption. *See Caterpillar,* 482 U.S. at 393, 107 S.Ct. 2425. In this case, the Plaintiffs have only asserted state law claims so that, on the face of the Complaint, there is no federal question jurisdiction.

There is, however, an exception, or corollary, to the well-pleaded complaint rule and it is this exception to which Beneficial and H & R Block point in claiming that this court has federal question jurisdiction. This exception

is known as the "complete pre-emption" doctrine. This exception is recognized in the rare instance Congress so "completely pre-empts a particular area that any civil complaint . . . is necessarily federal in character." *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 64, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). The situations in which the complete pre-emption exception applies are so rare that the Supreme Court has found complete pre-emption in only a few areas. *See Avco Corp. v. Aero Lodge No. 735,* 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968) (§ 301 of the LMRA completely pre-empted a state cause of action for violation of contracts); *Metropolitan Life,* 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (§§ 502(a)(1)(B) and 502(f) of ERISA completely pre-empted state contract and tort claims); *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974) (federal law pre-emption with regard to tribal lands).

Beneficial and H & R Block have argued for the application of the complete pre-emption doctrine in the instant case based on §§ 85 and 86 of the National Banking Act ("NBA"). The NBA states in part, that a national bank "may . . . charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located. . . . " 12 U.S.C. § 85. The NBA further provides for a civil enforcement mechanism. *See* 12 U.S.C. § 86.

Beneficial and H & R Block cite several cases, including a previous decision of this court, holding that §§ 85 and 86 of the NBA completely pre-empt state-law claims challenging interest charged by a national bank, and thus that such claims are removable from state to federal court. *See e.g., M. Nahas & Co. Inc. v. First Nat'l Bank of Hot Springs,* 930 F.2d 608 (8th Cir.1991); *Monday v. Coast to Coast Wireless Cable,* 1997 WL 114874 (M.D.Ala. Feb.19,

1997); *Hunter v. Rich's Dept. Stores,* 945 F.Supp. 1500 (N.D.Ala.1995) (Propst, J.). There is, however, contrary case law on the issue of whether the NBA completely pre-empts state law claims challenging excessive interest. *See e.g., Jones v. Bankboston, N.A.,* 115 F.Supp.2d 1350 (S.D.Ala.2000).

The Eleventh Circuit recently addressed for the first time the issue of complete pre-emption outside of the Labor Management Relations Act ("LMRA") and the Employees Retirement Insurance Security Act ("ERISA") context. *See BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc.,* 182 F.3d 851, 855 (11th Cir.1999) (finding no complete pre-emption under the Cable Communications Policy Act of 1984). In *BLAB T.V.,* the Eleventh Circuit examined the different tests employed by various circuits in assessing complete pre-emption arguments. *Id.* at 856. While the court declined to adopt any of the tests to be applied to all future claims of complete pre-emption, the court did note that, while it relied heavily on a particular decision of the Tenth Circuit, it did not adopt the view of the Tenth Circuit that a statute's providing a federal cause of action is dispositive on the issue of congressional intent. *Id.* at 859, n. 3. The Eleventh Circuit held that a state law claim was not completely preempted by the Cable Communications Policy Act of 1984 because the court found that the requisite congressional intent to convert state law claims into federal claims was absent. *Id.* at 859.

This court has been presented with complete pre-emption arguments under the NBA on two previous occasions, both of which were decided before the *BLAB T.V.* decision by the Eleventh Circuit. *See Monday v. Coast to Coast Wireless Cable,* 1997 WL 114874 at *1 (M.D.Ala.,

Feb. 19, 1997); *Mason v. Fidelity Federal Bank,* 40 F.Supp.2d 1340 (M.D.Ala.1999).

In *Monday,* this court, relying on complete pre-emption analysis in other cases, looked at three factors: Congressional intent, whether the NBA displaced state law claims with a federal cause of action, and whether the jurisdictional language of the civil enforcement provisions paralleled the LMRA and ERISA. *Monday,* 1997 WL 114874 at *6-7. Noting that the NBA pre-dated the existence of federal question jurisdiction, the well-pleaded complaint rule, and the complete pre-emption doctrine, this court relied on discussions of Congressional intent in binding case law. *Id.* at *6. This court relied on statements in Supreme Court and former Fifth Circuit cases that the NBA was intended to give advantages to national banks over state competitors, and that an action stating a claim of usury against a national bank is a new right which is regulated by federal law, in concluding that Congress intended for national banks to be governed by national standards, not state law. *Id.* (citing *Roper v. Consurve,* 578 F.2d 1106 (5th Cir.1978), *aff'd sub nom. on other grounds, Deposit Guaranty Nat'l Bank v. Roper,* 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980); *Marquette Nat. Bank of Minneapolis v. First Omaha Service Corp.,* 439 U.S. 299, 99 S.Ct. 540, 58 L.Ed.2d 534 (1978); *Farmers' and Mechanics' National Bank v. Dearing,* 91 U.S. 29, 35, 1 Otto 29, 23 L.Ed. 196 (1875)). This court further concluded that the jurisdictional language of the NBA was similar enough to the language used in the LMRA and ERISA, statutes which the Supreme Court has found completely pre-empt state law, to indicate that Congress intended for the federal remedy provided in the NBA to be the remedy which was available against national banks, whether the

forum be federal or state, there being no mechanism for removal to federal court at the time. *Id.* at *7.

Although this court did not have the analysis in *BLAB T.V.* before it when *Monday* was decided, the court finds that the *BLAB T.V.* decision does not alter its conclusion in *Monday* that §§ 85, 86 completely preempt state law claims claiming usurious interest. The Eleventh Circuit merely underscored the importance of Congressional intent in *BLAB T.V.,* and as noted above, this court's analysis in *Monday* was premised in large part on Congressional intent. While the NBA, because it pre-dated the relevant jurisdictional statutes and doctrines, may not neatly fit into the complete pre-emption analysis of modern statutes, this court finds that there is sufficient evidence in decisional law and the language of the NBA from which to conclude that Congress intended for national banks to be held to national standards, and not to be held liable under state law on claims alleging usury. Therefore, finding no reason to depart from its earlier analysis, the court again concludes that usurious interest claims are completely pre-empted under the NBA.

In the two cases in which this court was previously presented with an argument of complete pre-emption under the NBA, the court determined that there was no federal jurisdiction because the plaintiffs had not alleged claims of usurious interest, which is the type of claim that is completely preempted under the NBA. *See Monday,* 1997 WL 114874 at *10; *Mason,* 40 F.Supp.2d at 1345. In this case, the Plaintiffs have pleaded a claim for usurious interest. *See* Complaint, Count Four; Brief in Support of Motion to Remand, page 8. Accordingly, the Plaintiffs have brought a claim which is completely preempted by the NBA, creating federal question jurisdiction in this court.

The court recognizes that, while it has found evidence of Congressional intent to completely pre-empt state law usurious interest claims under the NBA, there is significant disagreement among courts over the presence of Congressional intent to completely pre-empt state law claims under the NBA. *See Jones,* 115 F.Supp.2d at 1357. The court further notes that the *BLAB T.V.* decision came before the Eleventh Circuit as a question certified for interlocutory appeal by the district court. *BLAB T.V.,* 182 F.3d at 854. This court is willing to certify the issue of complete pre-emption in this case for interlocutory appeal, if any of the parties indicate their desire for the court to do so by filing a written request by December 29, 2000.

V. *CONCLUSION*

For the reasons discussed above, this court has federal jurisdiction by virtue of the presence of a federal question in this case. Accordingly, the Motion to Remand (Doc. # 7) is due to be and is ORDERED DENIED.

ORDER

For good cause shown, it is hereby ORDERED that the Memorandum Opinion and Order of this court entered on December 14, 2000 is AMENDED to add the following paragraph:

> This order involves the issue of whether the court has jurisdiction to proceed with this case. Therefore, pursuant to 28 U.S.C. § 1292(b), the court certifies that it is of the opinion that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from

the order may materially advance the ultimate termination of the litigation. It is, therefore, FURTHER ORDERED that if the Plaintiffs make application for an appeal within ten (10) days after the entry of this order, pursuant to 28 U.S.C. § 1292(b), these proceedings are STAYED pending a determination of the application by the Court of Appeals and, if the appeal is permitted, final determination of the appeal by the Court of Appeals.

The Clerk is DIRECTED to serve copies of this Order by facsimile.

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37 Fed.Appx. 981

(The decision of the Court is referenced in an eleventh Circuit Table of Denials of Rehearing En Banc appearing in the Federal Reporter.)

United States Court of Appeals,
Eleventh Circuit.

Marie Anderson, Alvester Brafort
v.
H&R Block, Inc., Beneficial National Bank

NO. 01-11863

May 29, 2002

M.D.Ala., 287 F.3d 1038

DENIALS OF REHEARING EN BANC

12 U.S.C. § 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills, of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for

sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

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12 U.S.C. § 86. Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

DOUGLAS GALLAGHER, FERMIN TULLIER, PATRICK JUGE, BONNIE GILBERT, HARRY BATISTE, JR. and JULIE DAVENPORT

v.

H&R BLOCK EASTERN TAX SERVICES, INC., ET AL

CIVIL ACTION NO. 97-749-A

RULING ON MOTION TO REMAND

(Filed Jan. 13, 1998)

This matter is before the court on a motion to remand by plaintiffs, Douglas Gallagher, Fermin Tullier, Patrick Juge, Bonnie Gilbert, Harry Batiste, Jr., and Julie Davenport. Defendants, Eastern Tax Services, Inc., H&R Block, Inc., Block Financial Corporation, Danette Daigle, Paulette Landry, Lois Falcon, and Defendants A through Z (collectively "Block"), oppose the motion. Removal jurisdiction is allegedly based on federal question subject matter jurisdiction, 28 U.S.C. §1331.

Background

According to the memoranda and documents submitted by the parties in support thereof, on July 8, 1997, plaintiffs filed a class action petition in the 18th Judicial District Court, Parish of Iberville, State of Louisiana, seeking to recover monetary compensation for damages

and for attorney fees, for alleged financial harm by Block in scheme to systematically target and deceive lower income, unsophisticated taxpayers out of "exorbitant" interest and fees. Plaintiffs allege that Block induced plaintiffs and other Louisiana residents to 1) pay a fee to Block to secure their tax refunds supposedly more quickly than available elsewhere; and 2) pay outrageous finance charges for short term, fully secured loans from Block's lending banks.

The petition alleges that defendants are liable on the following counts: 1) fraudulent misrepresentation; 2) fraudulent concealment; 3) dual agency; and 4) breach of fiduciary duty.

On July 25, 1997, defendants filed a notice of removal.

Plaintiffs filed a motion to remand on August 15, 1997, on the grounds that 1) the claims by plaintiffs do not arise under federal law; and 2) if applicable, preemption would only be a defense to state law claims, and would not be grounds for removal. Plaintiffs also request that the court assess attorney's fees against Block.

Defendants oppose the motion on the grounds that 1) there are substantial, disputed questions of federal law in this case which are central to the claims by plaintiffs for recovery; and 2) plaintiffs have artfully pleaded in state law terms a completely preempted federal cause of action.

Arguments

Plaintiffs argue that the state court petition alleges no federal claims, only violations of Louisiana law, prohibiting fraud, suppression, breach of fiduciary duty and dual agency. Plaintiffs argue that the court should not accept

Block's distortion of the state law claims into a claim under the National Bank Act, 12 U.S.C. 21 *et seq.*, because plaintiffs do not sue Block under the Act, nor could they, because the Act regulates only the business of banking, and Block is not a bank. Plaintiffs argue that Louisiana's interest in prohibiting Block from deceiving Louisiana residents into exorbitant interest obligations does not impact the purpose of the Act or any other federal law.

Plaintiffs also argue that Block's supposed preemption defense cannot create federal jurisdiction, because the National Bank Act does not apply for preemption purposes when no claims against a bank have been asserted.

Defendants argue that the issue of the agency or broker status of defendants in relation to national banks is tantamount to their status as alleged "branch offices" "branch agencies", or "additional offices" of national banks conducting banking businesses, which is a matter of federal law; thus, defendants argue, the success of the allegations depends on a determination of whether one or more of the Block defendants were "agents" or "brokers" of these national banks in allowing the transactions to occur. Defendants argue that plaintiffs all but name the national banks as parties by alleging that the Block defendants concealed the fact that they were actually creditors on the loans.

Defendants also argue that, under the complete preemption component of the "artful pleading" doctrine, plaintiffs rest their case against defendants on the deceptive collection of excessive interest from plaintiffs pursuant to loans actually made by one or more national banks, in violation of the interest rates authorized by the National Bank Act. Defendants argue that, if plaintiffs are

willing to argue that Block is the legal surrogate of national bank lenders in the lending program, it follows that the preemptive effect of the laws that govern the national banks be applied to all aspects of the litigation, from the standpoint of liability, remedy and jurisdiction.

Law and Discussion

To support removal, defendant bears the burden of establishing federal jurisdiction over the state court suit.[1] Removal under section 1441(b), the basis of removal here, is appropriate only for those claims within the federal question jurisdiction of the district courts, that is, for those actions "arising under the Constitution, laws, or treaties of the United States."[2]

A case "arises under" federal law when a "right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of plaintiff's cause of action.[3] If, however, the state law creates the cause of action, the court must determine whether plaintiff's demand "necessarily depends on resolution of a substantial question of federal law."[4]

Generally, a suit may not be removed from state court to federal court on the basis of a federal defense including the defense of preemption; however, under the "complete

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[1] Carpenter v. Wichata Falls Independent School District, 44 F.3d 362, 365 (5th Cir. 1995).

[2] 28 U.S.C. §1331.

[3] Franchise Tax Bd. v. Const. Laborers Vacation Trust, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983).

[4] Id.

preemption doctrine", once an area of state law has been completely preempted, any claim based on that preempted state law is considered a federal claim and therefore arises under federal law.[5]

When plaintiff challenges the propriety of defendant's removal, defendant carries the burden of showing the necessary facts to support the court's exercise of removal jurisdiction.[6] Any doubts about the propriety of removal are construed in favor of remand.[7] The removal statute should be strictly construed against removal and all doubt should be resolved in favor of remand.[8]

The National Bank Act, 12 U.S.C. §21 *et seq.*, governs the operations of national banking associations.[9] The background begins in 1863 and 1864, when the Civil War Congress enacted and then reenacted the National Bank Act, which launched the modern national banking system by providing for federal chartering of private commercial banks and empowering the newly created national banks to issue and accept a uniform national currency.[10] Authorizing

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[5] Caterpillar Inc. v. Williams, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987).

[6] *See* Jernigan v. Ashland Oil, Inc., 989 F.2d 812, 815 (5th Cir. 1993); Willy v. Coastal Corp., 855 F.2d 1160, 1164 (5th Cir. 1988); McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 56 S.Ct. 780, 785, 80 L.Ed. 1135 (1936).

[7] Butler v. Polk, 592 F.2d 1293, 1296 (5th Cir. 1979).

[8] Shamrock Oil and Gas Corp. v. Sheets, 313 U.S. 100, 61 S.Ct. 868, 85 L.Ed. 1214 (1941).

[9] Jackson v. First Nat. Bank of Valdosta, 349 F.2d 71 (5th Cir. 1965).

[10] U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993), *citing* Act of

(Continued on following page)

national banks to "carry on the business of banking," the National Bank Act provides that such banks shall have power –

> "'To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes. . . . The business of dealing in securities and stock by the [bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the [bank] shall not underwrite any issue of securities or stock. . . . ' 12 U.S.C. §24 Seventh (1988 ed. and Supp. V)."[11]

The National Bank Act, 12 U.S.C. §85, permits a national bank to charge "interest at the rate allowed by the laws of the State . . . where the bank is located . . . and no more." Further, 12 U.S.C. §86 provides the penalty for usury against a national bank that "tak[es], receiv[es], reserv[es], or charg[es] a rate of interest greater than is allowed by Section 85."[12] Suits under sections 85 and 86 of

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Feb. 25, 1863, ch. 58, 12 Stat. 665; Act of June 3, 1864, ch. 106, 13 Stat. 99; E. Symons, Jr., & J. White, Banking Law 22-25 (3d ed. 1991); and 12 U.S.C. §38.

[11] NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995).

[12] 12 U.S.C. §§85-86.

the National Bank Act, and the predecessors of those sections, are federal question cases.[13]

Plaintiffs allege that the "Rapid Refund" program is a loan program administered by defendants *in association with banking institutions*. Plaintiffs allege that defendants solicited from their clients, *on behalf of various banks*, loans which were collateralized with the expected refund. Under the *arrangement with the banks which issue the loans*, plaintiffs allege, defendants *received a kickback from the banks* for each refund anticipation loan entered into by its clients. Plaintiffs allege that the true nature of the relationship between defendants and the lender was that of *broker or agent for the lender*. It is clear that plaintiffs have attempted to gain the liability and class action benefits of identifying defendants with the banks but none of the jurisdictional consequences of the allegations.

The state court petition clearly alleges that the loans were made *by the national banks* through their agent, H & R Block. The state court petition clearly attacks the validity of the *loans made by the national banks*. These allegations are sufficient to implicate the provisions of sections 85 and 86 of the National Bank Act, even though the banks themselves are not now joined as parties to the action.

Although the National Bank Act regulates only the business of banking and named defendants are not banking associations, defendants have provided persuasive support

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[13] Fourchon, Inc. v. Louisiana National Leasing Corp, 723 F.2d 376 (5th Cir. 1984).

for their claim which would place this matter under the National Bank Act. Plaintiffs may not escape federal jurisdiction by artfully omitting parties to the transactions that are the subject of this lawsuit.

Accordingly, for the reasons assigned, the motion by plaintiffs to remand is hereby DENIED.

/s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

Supreme Court, U.S.
FILED
DEC 23 2002
OFFICE OF THE CLERK

Nos. 02-306 & 02-312

IN THE

Supreme Court of the United States

BENEFICIAL NATIONAL BANK and
BENEFICIAL TAX MASTERS, INC.,

Petitioners,

-and-

H & R BLOCK, INC.,

Petitioner,

v.

MARIE ANDERSON, *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit of Appeals was correct in refusing to expand the extremely limited doctrine of complete or field preemption to claims where the National Bank Act may provide a defense to a state law claim, and the law is that a case in which the plaintiff asserts only state law claims may not be removed to federal court based on a federal defense — even the defense of ordinary preemption. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 399 (1987) ("Congress has long since decided that federal defenses do not provide a basis for removal.").

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Appendix A — Complaint 1a

Appendix B — In The United States District Court For The Northern District Of Alabama, Western Division Dated And Filed September 6, 2002 ..... 12a

OBJECTION TO JURISDICTION

Neither this Court, nor any other Federal court, has jurisdiction over this case because the diversity statute does not apply, and there is no claim, "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, allowing for removal jurisdiction under 28 U.S.C. § 1441(b).

STATEMENT OF THE CASE

On or September 19, 2000, Plaintiff Marie Anderson, and twenty-five (25) other persons, filed a Complaint in the Circuit Court of Barbour County, Alabama, Clayton Division, against defendants H & R Block, Inc. ("H & R Block"), Beneficial National Bank, and Beneficial Tax Masters, Inc. (collectively referred to herein as "Beneficial"). The factual allegations of the Complaint are that Plaintiffs went to H & R Block, and were participants in the H & R Block tax refund anticipation loan program. A tax refund anticipation loan is where a taxpayer is given a short term loan from Beneficial in exchange for a pledge of an anticipated tax refund. The allegations of the Complaint are that the interest rate paid by Plaintiffs for the tax refund anticipation loans was higher than the rate disclosed to the plaintiffs, that Defendants utilized unreasonable repayment periods to calculate the interest rate, and that the amount charged for interest was in excess of that allowed by the State of Alabama. The causes of action in the Complaint are for fraud (Count I); suppression (Count II); breach of fiduciary duty (Count III); for the charging of an excessive interest rate under Ala. Code § 8-8-1 (1975) (Count IV); and for violation of the Alabama Mini-Code (Count V).

Defendants removed the case to the District Court for the Middle District of Alabama, asserting complete preemption of Plaintiffs' usury claims under the National Bank Act. On November 22, 2000, Plaintiffs timely filed a Motion to Remand. On December 14, 2000, the District Court entered an Order denying Plaintiffs' Motion to Remand the case to state court. However, the District Court certified its Order denying Plaintiff's remand motion for interlocutory appeal to the Eleventh Circuit Court of Appeals. On April 3, 2002, the Eleventh Circuit reversed the District Court's Order denying Plaintiff's Motion to Remand, and remanded the case for further proceedings consistent with its opinion. Both Beneficial and H & R Block have filed Petitions for a Writ of Certiorari with this Court.

STATUTORY PROVISIONS INVOLVED

In addition to the provisions set forth in the petitions, Ala. Code § 8-8-1 (1975) is also involved.

REASONS FOR DENYING THE PETITION

Petitioners point to the case of *M. Nahas & Co., Inc. v. First National Bank*, 930 F.2d 608 (8th Cir. 1991), as an example of a split in the circuits such that certiorari ought to be granted in this case. However, neither this opinion, nor its progeny, *Krispin v. May Dept. Stores Co.*, 218 F.3d 919 (8th Cir. 2000), compel this Court to exercise its limited jurisdiction.

Supreme Court Rule of Procedure 10 sets forth factors to be considered in granting a Petition for Writ of Certiorari. One of those is when a Circuit Court has entered a decision in conflict with the decision of another Circuit "on the same

important matter." Sup. Ct. R. 10(a). While the Eighth Circuit's opinion does completely preempt a state law usury claim, even the decisions relied upon by Defendant do not stand for the proposition than any claim that may be defensively preempted by the National Banking Act is necessarily completely preempted by the Act such that a federal court has jurisdiction.

In *M. Nahas*, the Court held that, "in areas other than usury, national banks have been denied removal even though the National Bank Act would ultimately control all or part of plaintiffs' state law action." *M. Nahas*, 930 F.2d at 611, citing *Gully v. First National Bank*, 627 F.2d 843 (8th Cir. 1980). In *M. Nahas*, the Court not only affirmed the denial of the plaintiffs' motion to remand, but also dismissed the case based on the statute of limitations, thereby ending the case. However, that would not be the situation here. First, if Defendants' arguments are carried to their logical end, the claims would first be completely preempted, and then the claim for usury would be defensively preempted. This would leave Plaintiffs' fraud, suppression, breach of fiduciary duty, and Alabama mini-code claims in federal court with no jurisdictional basis. Apparently, however, that is what Defendants seek in this case, complete field preemption of any claim that in any way touches or concerns the National Bank Act.[1] That is not what the *M. Nahas* decision stands

1. Any question that what Defendants seek to accomplish here is much broader than simply having usury claims completely preempted is answered by the activities of these same two defendants in the case of *Hare, et al. v. H & R Block and Beneficial*, Case No. CV-02-C-C-1848-W, pending in the United States District Court for the Northern District of Alabama (copies of the Complaint and Order denying Motion to Lift Stay and Remand to State Court attached

(Cont'd)

for, and its not even the basis upon which Defendants seek to graft federal jurisdiction on in this action. In both *M. Nahas* and *Krispin*, the Court was dealing with a claim of usury, without regard or consideration as to the implications of complete or field preemption on other claims even the Eighth Circuit has not found to provide basis for removal. The alleged "split" occurred in cases with a key factual distinction. In *M. Nahas*, the case was due to be dismissed

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(Cont'd)

hereto as Appendices AI and AII). *Hare* is a tax refund anticipation loan case, with a factual scenario very similar to the case *sub judice*. However, the Complaint does not contain a cause of action for the charging of a usurious interest rate. Despite the absence of a claim that even has the National Bank Act as a defense, Defendants have successfully managed to remove the case, and keep it in Federal Court, on preemption grounds. This was done despite the Eighth Circuit opinion in *First National Bank of Aberdeen v. Aberdeen National Bank*, 627 F.2d 843 (8th Cir. 1980). In *First National Bank of Aberdeen*, the same Eighth Circuit that decided the *M. Nahas* case held, in a case wherein the defendants sought preemption based on the National Bank Act, as follows:

> These quoted passages clearly suggest that the *Gully* Court believed a defensive assertion of preemption did not give rise to federal question jurisdiction.
>
> * * *
>
> But however *Avco* may be interpreted in special circumstances, we are not persuaded that the Supreme Court in *Avco* intended to invalidate the generally accepted principle that defensive assertion of federal preemption in response to a state law claim may not constitute ground for removal.

First National Bank of Aberdeen, 627 F.2d at 852.

once the doctrine of complete preemption was applied. In this case, this Court would have to go even a step further and confer federal jurisdiction over state law claims that do not even suggest a defense of ordinary preemption. Even the Eighth Circuit has decided this cannot stand. *See, M. Nahas, supra*. As such there is no true split here, and certainly not a split on "the same important matter."

A. *The Burden Is On Defendants To Show That State Law Causes Of Action Are Removable.*

It is well-established that the burden is on the shoulders of the removing party to prove that removal is proper, and to prove that the district court has jurisdiction over the removed case. *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 411-12 (11th Cir. 1999); *see also Pacheco de Perez v. AT&T Co.*, 139 F.3d 1373 (11th Cir. 1998). Federal courts are of limited jurisdiction, and removal is not favored. A case will be remanded whenever jurisdiction is in doubt. *Burns v. Windsor Ins. Co.*, 31 F.2d 1092, 1095 (11th Cir. 1994). Moreover, a case cannot be removed on the basis of a federal defense, including the defense of preemption. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987).

The United States Supreme Court has recognized complete preemption of state law claims only in the rarest of circumstances. Those circumstances only exist where the preemptive force of the federal statute is so "extraordinary" that it "converts an ordinary common law complaint into one stating a federal claim for purposes of the well pled complaint rule." *Caterpillar, Inc.*, 482 U.S. at 393. These "extraordinary" circumstances have been recognized by the Supreme Court in only two areas: the Labor Management Relations Act of 1947 ("LMRA"); and the Employer

Retirement Income Security Act of 1974 ("ERISA"). *See Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968). (Section 301 of the LMRA "completely preempted" any state law cause of action for violation of mandatory arbitration clauses between an employer and a labor organization); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (Sections 502(a)(1)(B) and Section 502(f) of ERISA "completely preempt" employees common law contract and tort claims arising from the employer's insurer's termination of disability benefits under an ERISA Plan). *See also Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998) (Knowing that Supreme Court precedent allows only two instances of complete preemption). What Defendants wish to do now is to add a third category of complete preemption in the National Bank Act. However, even the Eighth Circuit does not go so far. *See, id.*

B. ***The Parameters Of The National Bank Act Fall Far Short Of What Is Necessary For "Complete" Or "Field" Preemption.***

Any discussion of complete preemption must begin with the recognition that complete preemption is an "extraordinary" remedy that the Court has been "reluctant" to expand. It must be recognized that, even where it does apply, complete preemption operates as an extraordinary departure from the well-pleaded complaint rule, which states that a case in which the plaintiff asserts only state law claims may not be removed to Federal court based on the existence of a federal defense — even the defense of ordinary preemption. *Caterpillar, Inc.*, 482 U. S. at 393. ("Congress has long since decided that federal defenses do not provide a basis for removal.")

1. *Difference Between Ordinary And Complete Preemption.*

Ordinary preemption is a defense that may be raised in a state court, as well as in federal court. As a defense, ordinary preemption does not appear in the plaintiff's well-pleaded complaint, and thus does not give the defendant the ability to remove a case to federal court. *Caterpillar, Inc.*, 482 U.S. at 393. Unlike the defense of ordinary preemption, the doctrine of complete preemption gives a defendant the ability to remove the case to federal court. *BLAB TV of Mobile, Inc. v. Comcast Cable Comm., Inc.*, 182 F.3d 851, 854 (11th Cir. 1999).

The Supreme Court has found complete preemption under only the two federal statutes related above. In *Metropolitan Life Ins. Co. v. Taylor*, 481 U. S. 58 (1987), the Supreme Court cautiously extended the doctrine of complete preemption to ERISA § 502(a) claims. However, the doctrine of complete preemption applies only where Congress has "clearly manifested an intent" to make a particular cause of action removable to a federal court. *Metropolitan Life Ins. Co.*, 481 U. S. at 66. The *Metropolitan Life* Court explained the difference between ordinary and complete preemption as such:

> Federal preemption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. *Gulley v. First National Bank*, 1099 U.S. 109 (1936). One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely preempt a

> particular area that any civil complaint raising the select group of claims is necessarily federal in character. For twenty years, this Court has singled out claims preempted by § 301 of the LMRA for such special treatment.[2]

Metropolitan Life, 481.U. S. at 60. In *Taylor*, the Court noted that, "Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) [of ERISA] removable to federal court." *Id.* at 66. However, there is no similar "clear manifest of intent" to make causes of action within the scope of the National Bank Act removable to federal court. In fact, the *M. Nahas* Court specifically recognized that national banks have been denied removal of claims even though the National Bank Act would ultimately control all or part of a plaintiff's state law action. *M. Nahas*, 930 F.2d at 608.

2. *There Is No Evidence Of Any Intent To Displace State Causes Of Action By The National Banking Act.*

In order for there to be complete preemption, the preemptive force of a federal statute must be "so powerful" as to "displace entirely any state cause of action." In the LMRA context, the Courts have held that the congressional

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2. Defendant's concerns that somehow they are without the ability to use their ordinary preemption defense in the Alabama state courts is unfounded. Alabama courts have a long history of applying the doctrine of ordinary preemption to §§ 85 and 86 of the National Bank Act. *Helms v. First Alabama Bank, N.A.*, 386 So. 2d 450 (Ala. 1980); *Florence R. R. & Improvement Co. v. Chase National Bank*, 17 So. 720 (Ala. 1895). The denial of federal jurisdiction does not preclude the defense of preemption. *Smith v. GTE Corporation*, 236 F.3d 1292 (11th Cir. 2001).

intent is present to preempt any cause arising out of an employer/employee relationship covered by a collective bargaining agreement. This complete preemption power in the LMRA context has been stated in the following terms. "The necessary ground of decision [in Avco] was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.'" *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983), quoted in *Metropolitan Life*, *supra*. It is clear, even under Eighth Circuit precedent, that the National Bank Act does not displace entirely any cause of action between a person and a national bank, or where the National Bank Act that is implicated. *See M. Nahas*, *First National Bank of Aberdeen*, *supra*. As such, the doctrine of complete preemption simply does not apply.

In fact, the text of the National Bank Act shows just the opposite. The text of the NBA shows that it was intended that National Banking Associations could be sued in the state courts. When Congress replaced the 1963 Act in 1964, the statutory language provided for "Suits, actions and proceedings, against any association under this act, may be had in any circuit, district, or territorial court . . . or in any state county, or municipal court in the county or city in which said association is located . . ." *Mercantile Nat'l Bank at Dallas v. Longdeau*, 371 U.S. 555 (1963), citing 13 Stat. 116-17. Even today the Act at 12 U.S.C. § 24 states that a National Association shall have the power, "To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." 12 U.S.C. § 24. Clearly, it was not the intent of Congress when the National Bank Act was granted, nor is it the intent today, that National Banking Associations only be subject to suit in the federal courts.

The subsections of the National Bank Act that are at issue in the present case were initially enacted as § 30 of the National Bank Act of 1864, which is now codified at 12 U.S.C. §§ 85-86[3] and state as follows:

> Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, **interest at the rate allowed by the laws of the State**, Territory or District where the bank is located, or at a rate of one per centum in excess of the discount rate on 90-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where the laws of any State a different rate is limited for banks organized under state laws, if the rate so limited shall be allowed for associations organized or existing in any such state under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve or charge a rate not exceeding 7 per centum, or one per centum in excess of the discount rate on 90-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in

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3. Sections 85 and 86 were enacted into law by Congress *before* the existence of federal jurisdiction as enacted under 28 U.S.C. § 1331. The first version of § 1331 was enacted on March 3, 1875, ch. 137, § 1, 18 Stat. 470. *See Franchise Tax Board of State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 8, 103 S. Ct. 2841, 2845, 77 L. Ed. 2d 420 (1983).

> advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States or a District of Columbia shall be at the rate allowed by the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. At the purchase, discount, or sale of a bonafide bill of exchange, payable to another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange per site drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

12 U.S.C. § 85 (emphasis added).

> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by § 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: provided, that such action is commence within two years from the time the usurus transaction occurred.

12 U.S.C. § 86.

The National Bank Act, 12 U.S.C. § 85, vests the *states* with the authority to legislate and establish interest rate limitations. As such, it is highly unlikely that Congress intended to confer complete federal preemption through the adoption of the laws of the several states. *Cf. Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207 (11th Cir. 1999) (super preemption applies when Congress comprehensively occupies a field of law and is necessarily federal in character). In this case, Appellees argue that the laws of Delaware control the loan interest rate, rather than the laws of Alabama, where the loans were issued. Yet, on the other hand, it is clear that the National Bank Act would *not* preempt or otherwise apply to an interest rate claim by an Alabama consumer against an Alabama bank. The same is true with any Delaware consumer against a Delaware bank. This in itself illustrates that the National Bank Act does not displace the field of state interest rate regulation.

In a thorough analysis of precedent on the issue, the United States District Court for the Southern District of Alabama ruled that the National Bank Act *does not* confer complete preemption over state law claims for excessive interest. In *Jones v. BankBoston, N.A.*, 115 F. Supp. 2d 1350 (S.D. Ala. Oct. 2, 2000), the Court engaged in a significant analysis of the Congressional intent and history of the National Bank Act.

> [T]he significance to complete preemption analysis of jurisdictional language paralleling that of the LMRA is dependent on whether the jurisdictional language was enacted after the 1968 *Avco*[4] decision; only then may it be inferred that

4. *Avco Corp. v. Aero Lodge No. 735, International Assoc. of Machinists & Aerospace Workers*, 390 U.S. 557, 88 S. Ct. 1235, 20 L. Ed. 2d 126 (1968).

> Congress, by its use of such language, desired to mimic the complete preemption embedded in the LMRA. Because the National Bank Act's jurisdictional provision was enacted a century before *Avco*, it cannot be construed as an effort to invoke complete preemption by parallelism . . . Even if closely parallel jurisdictional language carried any significance with respect to statutes enacted before 1968, the National Bank Act's jurisdictional provision does not closely parallel that of the LMRA.
>
> The most striking difference between the National Bank Act and the LMRA, however, lies in their treatment of state court jurisdiction; while the LMRA is silent, the National Bank Act expressly contemplates state court jurisdiction. Thus the National Bank Act's jurisdictional provision varies materially in every respect from the jurisdictional language common to the LMRA and ERISA. Such a jurisdictional provision cannot be said to "closely parallel" the LMRA for purposes of complete preemption analysis.

Jones, 115 F. Supp. 2d at 1358. The *Jones* Court went on to analyze the faulty reasoning of the *M. Nahas* decision.

> The Eighth Circuit's reliance on the existence of an "exclusive federal remedy" without any further showing of congressional intent is not only inconsistent with *BLAB TV*, by which this Court is bound, but also appears to contradict *Metropolitan Life v. Taylor* itself . . . were the existence of an "exclusive federal remedy" the

> only requirement for complete preemption, the *Metropolitan Life* Court would have concluded its analysis at this point and declared the Plaintiffs' claims completely preempted. Rather than doing so, the Court noted it would be "reluctant" to grant complete preemption on so slender a basis and instead launched into its explication of the statute and its legislative history. . . . This Court is aware of no other appellate court utilizing the Eighth Circuit's lenient test for complete preemption and is neither empowered nor inclined to adopt it.

Jones, 115 F. Supp. 2d at 1356 (citations omitted in original).

In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987), the Supreme Court held that express statutory language and Congressional intent to displace entirely any state cause of action was *required* for the application of the doctrine of complete preemption. The Court examined language of the jurisdictional subsection of ERISA's civil enforcement provisions and determined that Congress had clearly manifested an intent to make state causes of action removable to federal court. *Taylor*, 481 U.S. at 65, 107 S. Ct. at 1547. The Supreme Court clarified its holding on complete preemption by stating that:

> [E]ven with a provision such as [ERISA] § 502(a)(1)(B) that lies at the heart of a statute with the unique pre-emptive force of ERISA, however, we would be reluctant to find that extraordinary preemptive power, such as has been found with respect to § 301 of the L.M.R.A., that converts an ordinary state common law complaint

> into one stating a federal claim for purposes of the well-pleaded Complaint rule.

Taylor, 481 U.S. at 65, 107 S. Ct. at 1547 (internal citations omitted).

The Third Circuit, in the case of *Spellman v. Meridian Bank (Delaware)*, 1995 WL 764548,[5] explained the Supreme Court precedent as to complete preemption in words far more elegant than this writer could summon.

> The Supreme Court has held affirmative evidence of Congressional intent could be the touchstone of the federal district court's removal jurisdiction and, as discussed above, the court has found such intent only rarely. The complete preemption doctrine was originally rooted in a cause of action arising under § 301 of the L.M.R.A. The court extended the doctrine reluctantly, in *Metropolitan Life*, to an action arising under ERISA. The court wrote that it did so only because "ERISA's civil enforcement provisions closely parallels [sic] that of § 301 of the L.M.R.A.," and because explicit language in the ERISA Conference Report analogized the ERISA provision to the L.M.R.A.

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5. The *Spellman* opinion is available as a 1995 West law cite, and was not published in the Federal Reporter. Following the panel opinion, the Third Circuit voted to grant rehearing *en banc* and vacated the panel opinion. The appeal was dismissed before any *en banc* opinion was issued. The appeal was dismissed in July of 1996 pursuant to the Supreme Court's ruling in *Smiley v. CitiBank*, 517 U.S. 735 (1996) which involved a technical definition of "interest" and did not involve the issue of complete preemption.

language. In the absence of explicit direction from Congress, the court wrote:

> [e]ven with a provision such as 502(a)(1)(B) [the jurisdictional provision] that lies at the heart of a statute with the unique pre-emptive force of ERISA . . . we would be reluctant to find that extraordinary pre-emptive power, such as that has been found with respect to 301 of the L.M.R.A., that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.

Neither the National Bank Act nor DIDA contains a jurisdictional provision evidencing Congressional intent to permit removal of the sort relied upon in *Avco* and *Metropolitan Life*. Nor have the banks pointed to Congressional language suggesting that parties may bring suit against banks in federal court without regard to the citizenship of the parties or the amount in controversy.

Congressional intent to permit removal based on complete preemption would be difficult to divine from the legislative history of the National Bank Act, because the act was passed in 1864, pre-dating federal question jurisdiction, the well pleaded complaint rule, and the doctrine of complete preemption. The banks argue, nonetheless, that Congress evidenced an intent to provide an exclusive source of relief for claims

> of overcharge that, coupled with the general federal provision allowing for removal of federal question cases, demonstrates Congressional intent to allow removal. However, the defendants point to nothing in the legislative history of §§ 85 and 86 that present the sort of clear indication of Congressional intent we have looked for in the past.
>
> There appears to be no indication that Congress intended to completely preempt the regulation of national banks or federally-insured state lending institutions. Therefore we will reverse the judgments of the district court that found complete preemption.

Spellman, 1995 WL 764548, *6-7 (internal quotations omitted).

The requirements specifically articulated by the Supreme Court are not met in this case — there is neither statutory language nor Congressional intent that the National Bank Act displaces entirely the Plaintiffs' state law causes of action.[6] Further examination of the absence of complete

6. Defendants' assertion that congressional intent cannot possibly be gleaned as to removal under the National Bank Act because it was enacted before general federal question jurisdiction, and before removal was allowed, is not true. First, when Congress enacted the National Bank Act in 1864, it provided that suit could be brought in federal or state court. *See*, *supra*. Moreover, had the Congress wished to provide for removal of suits under the National Bank Act, it could have done so. At the time, Congress had provided in a handful of civil acts that federal law would both provide a defense, and while for removal of a cause of action from state to

(Cont'd)

preemption in the National Bank Act by the District Court for the Southern District of Florida has held that banking is not an area in which Congress has evidenced an intent to occupy the entire field to the exclusion of the states, and thus state legislatures may legislate in all areas not expressly or impliedly preempted by federal legislation. *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041 (S.D. Fla. 1998).

> The determination of the maximum amount of interest which may be charged for the use of money loaned has always been within the police power of the state, and the details of the exceptions to the legislation have rested within the discretion of the state legislature. In § 85 of the Bank Act, Congress expressly and unambiguously stated that a national bank was subject to the interest provision of the laws of the state in which the bank was located.

Video Trax., 33 F. Supp. 2d at 1050 (S.D. Fla. 1998) (internal citations omitted).

(Cont'd)

federal court. *See, e.g.*, Act of March 3, 1863, 12 Stat. 755 (amended by the Act of May 11, 1866, 14 Stat. 46), Congress provided for a federal defense and provided the right of removal of civil or criminal actions arising out of acts committed under federal authority during the Civil War. *See Mayor & Alderman of City of Nashville v. Cooper*, 73 U.S. 247 (1867); *Michael T. Collins, the Unhappy History of Federa' Question and Removal*, 71 Iowa Law Review 717, 720-21 (1986). Simply put, had Congress, at the time, it intended that suits arising out of the National Bank Act be litigated only in the state courts, Congress had the ability to provide for such extraordinary jurisdiction. It chose not to do so with regard to the National Bank Act.

There is no question that interest rates are determined by state law. There is no legislative language evidencing Congressional intent that state-law actions relating to interest rate claims against national banks are to be considered as arising under federal law for purposes of removal jurisdiction. There is no indication that the National Bank Act's jurisdictional language is intended to function in the same manner of Section 301 of the LMRA, or § 502(a) of ERISA, pursuant to the guidance of the Supreme Court in *Metropolitan Life v. Taylor*. *See BLAB TV*, 132 F.3d at 857. Defendants cannot extrapolate the doctrine of complete preemption and claim that the laws of the State of Delaware, through the application of 12 U.S.C. § 85 and "super preemption", create federal subject matter jurisdiction.

At best, the provisions of the National Bank Act only create a defense based upon the factual application of interest regulations between the several States and relies on interpretation of the *laws of a particular state*. Therefore, removal of the Plaintiffs' case was improper since a case cannot be "removed on the basis of a federal defense, including the defense of preemption." *Caterpillar*, 482 U.S. at 393; *Kemp v. International Bus. Mach. Corp.*, 109 F.3d 708, 714 (11th Cir. 1997).

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — COMPLAINT

IN THE CIRCUIT COURT OF SUMTER COUNTY, ALABAMA

Civil Action No.: _____

MARTHA SUE HARE; OTIS JENNINGS; MILDRED P. SMITH; and WILLIE E. SMITH;

Plaintiffs,

vs.

H & R BLOCK EASTERN TAX SERVICES, INC.; H & R BLOCK, INC.; BENEFICIAL NATIONAL BANK; and BENEFICIAL TAX MASTERS, INC.,

Defendants.

There may be other entities whose true names and identities are unknown to the Plaintiffs at this time who may be legally responsible for the claim(s) set forth herein who may be added by amendment by the Plaintiffs when their true names and identities are accurately ascertained by further discovery. Until that time, the Plaintiffs will designate these parties in accordance with Rule 9(h), Alabama Rules of Civil Procedure. The word "entity" as used herein is intended to refer to and include any and all legal entities including individual persons, any and all forms of partnerships, any and all types of corporations and unincorporated associations. The symbol by which these party Defendants are designated is intended to include more than one entity in the event that discovery reveals that the descriptive characterization of the

symbol applies to more than one "entity." In the present action, the party Defendants which the Plaintiffs must include by descriptive characterization are as follows: "A", "B" & "C", whether singular or plural, being the entity that was the finance company described below that committed the wrongful acts alleged in Plaintiffs' Complaint, and/or the entity on whose behalf the agent in question was acting; "D", "E" & "F", whether singular or plural, being that entity or persons, other than those entities and persons described above, which is the successor in interest, or the assignee, or which undertook the duties, or assumed the liabilities of any of the entities described herein. Plaintiff alleges that the identities of the fictitious party-Defendants are otherwise unknown at this time, or, if known, their identities as proper party-Defendants are not known, but their true names will be substituted by amendment when ascertained.

COMPLAINT

1. Plaintiff, Martha Sue Hare, is a resident citizen of Sumter County, Alabama and is over the age of nineteen years.

2. Plaintiff, Otis Jennings, is a resident citizen of Sumter County, Alabama and is over the age of nineteen years.

3. Plaintiff, Mildred P. Smith, is a resident citizen of Sumter County, Alabama and is over the age of nineteen years.

4. Plaintiff, Willie E. Smith, is a resident citizen of Sumter County, Alabama and is over 5.The Defendant H & R Block Eastern Tax Services, Inc. (hereinafter "Eastern Tax Services")

is a foreign corporation doing business in Sumter County, Alabama at all times relevant to the facts herein.

6. The Defendant H & R Block, Inc. (hereinafter "HRB) is a foreign corporation doing business in Sumter County, Alabama at all times relevant to the facts herein.

7. The Defendant Beneficial National Bank (hereinafter "Beneficial) is a foreign corporation doing business in Sumter County, Alabama at all times relevant to the facts herein. Upon information and belief, Beneficial was acquired and/ or merged with Household International, Inc. on or about June 1998.

8. The Defendant Beneficial Tax Masters (hereinafter "Tax Masters") is a foreign corporation doing business in Sumter County, Alabama. Upon information and belief, Tax Masters was acquired and/or merged with Household International, Inc. on or about June 1998.

9. There may be other entities whose true names and identities are unknown to the Plaintiffs at this time who may be legally responsible for the claim(s) set forth herein who may be added by amendment by the Plaintiffs when their true names and identities are accurately ascertained by further discovery. Until that time, the Plaintiffs will designate these parties in accordance with Rule 9(h), Alabama Rules of Civil Procedure. The word "entity" as used herein is intended to refer to and include any and all legal entities including individual persons, any and all forms of partnerships, any and all types of corporations and unincorporated associations. The symbol by which these party Defendants are designated

is intended to include more than one entity in the event that discovery reveals that the descriptive characterization of the symbol applies to more than one "entity." In the present action, the party Defendants which the Plaintiffs must include by descriptive characterization are as follows: "A", "B" & "C", whether singular or plural, being the entity that was the finance company described below that collected fees or interest and/or committed the wrongful acts alleged in Plaintiffs' Complaint, and/or the entity on whose behalf the agent in question was acting; "D", "E" & "F" whether singular or plural, being that entity or persons, other than those entities and persons described above, which is the successor in interest, or the assignee, or which undertook the duties, or assumed the liabilities of any of the entities described herein. Plaintiff alleges that the identities of the fictitious party-Defendants are otherwise unknown at this time, or, if known, their identities as proper party-Defendants are not known, but their true names will be substituted by amendment when ascertained.

JURISDICTION AND VENUE

10. The events giving rise to the claims in this Complaint originated in Sumter County, Alabama. Upon information and belief, Defendants and Fictitious Party Defendants presently conduct business by agent in Sumter County, Alabama, and have done so at all times relevant to this Complaint. Venue is proper in the Circuit Court of Sumter County, Alabama as to Defendants and Fictitious Defendants pursuant to *Ala. Code* § 6-3-7 (1975) and Alabama Rule of Civil Procedure.

Appendix A

11. Plaintiffs do not plead any cause of action under any federal law. Each Plaintiff individually seeks judgment against Defendants joint and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff.

FACTUAL ALLEGATIONS

12. Each named Plaintiff retained the services of the Defendants as tax professionals.

13. The Defendants undertook a confidential relationship with each Plaintiff and established the trust and confidence for professional advice for taxation matters.

14. Defendants held themselves out to be financial advisors functioning on behalf of the interest of the Plaintiffs.

15. Defendants made refund anticipation loans to each of the named Plaintiffs and charged the Plaintiffs for tax refund anticipation loans.

26. Upon information and belief, Defendants maintained a fee sharing agreement under which the Defendants profited by making the refund anticipation loans. The assessment of costs and fees has damaged the Plaintiffs.

17. Defendants have wrongfully charged Plaintiffs for excessive fees relating to refund anticipation loans.

Appendix A

COUNT I
INTENTIONAL MISREPRESENTATIONS

18. Plaintiffs reallege and incorporate by reference the foregoing paragraphs 1 through 17 and further aver as follows:

19. Defendants misrepresented material facts to the Plaintiffs which facts include, but are not limited to, the following:

(a) the costs paid by the Plaintiffs.

(b) the Plaintiffs fees and costs would be substantially higher than those disclosed due to the Defendants' receipt of loan repayments.

(c) the Defendants utilized unreasonable repayment periods to calculate the costs of the loan.

20. Defendants actions constituted conduct involving actual malice, or, in the alternative, were a part of a pattern or practice of intentional wrongful conduct.

21. Defendants intended for Plaintiffs to rely upon the misrepresentations described hereinabove, and Plaintiffs reasonably and justifiably relied on those representations to their detriment by:

(a) paying excessive interest and fees to the Defendants;

(b) foregoing the use of their money; and

(c) suffering mental anguish.

22. As a direct and proximate consequence of Defendants actions, Plaintiffs have been injured and damaged as identified herinabove.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand judgment against Defendants jointly and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff, in an amount to be determined by a jury.

COUNT II
SUPPRESSION OF MATERIAL FACTS

23. Plaintiffs reallege and incorporate by reference the foregoing paragraphs 1 through 22 and further aver as follows:

24. Defendants, withheld, concealed, and suppressed from Plaintiffs certain material facts which the Defendants were under a duty to communicate to them, based upon a confidential relationship of the parties or the facts of this particular case.

25. The material facts which the Defendants withheld, concealed, and suppressed from Plaintiffs include, but are not limited to, the following:

(a) the loan cost paid by the Plaintiffs exceeded the costs to the plaintiffs.

(b) the Plaintiffs' costs would be substantially higher than the costs disclosed due to the Defendants' receipt of loan repayments.

(c) the Defendants utilized unreasonable repayment periods to calculate the loan costs.

26. Defendants intended for Plaintiffs to rely upon the suppressions described hereinabove, and Plaintiffs reasonably and justifiably relied on those suppressions to Plaintiffs' detriment by:

(a) paying excessive costs and fees to the Defendants;

(b) foregoing the use of their money; and

(c) suffering mental anguish.

27. Defendants' actions were fraudulent, malicious, wanton, gross and/or oppressive, and were intended to injure or defraud Plaintiffs.

28. Defendants' actions constituted conduct involving actual malice, or, in the alternative, were a part of a pattern or practice of intentional wrongful conduct.

29. As a direct and proximate consequence of Defendants' conduct, Plaintiffs have been injured and damaged as described hereinabove.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand judgment against Defendants jointly and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff, in an amount to be determined by a jury.

COUNT III
BREACH OF FIDUCIARY DUTY

30. Plaintiffs reallege and incorporate by reference each fact contained in paragraphs 1 through 29 above, and in the counts below, as if pleaded separately herein.

31. By virtue of the relationship of the Plaintiffs and Defendants, the facts suppressed by the Defendants, and the superior knowledge and bargaining position of the Defendants, a confidential and fiduciary relationship arose between the Plaintiffs and the Defendants. Plaintiffs reposed confidence and trust in Defendants, and relied on Defendants' duties to act in the best interest of the Plaintiffs.

32. Defendants breached their duty to the Plaintiffs and failed to disclose the Defendants' licencing agreement. Defendants' breach their duty and failed to notify the Plaintiffs of a conflict of interest in profiting from the licensing arrangement.

33. Plaintiffs further relied on Defendants' actions and representations and were induced by Defendants to pay excessive costs and fees, when Plaintiffs otherwise would not have paid excessive costs and fees.

Appendix A

34. Defendants had a duty to make financial decisions in the interest of the Plaintiffs.

35. Defendants and their agents recklessly breached their fiduciary duty to Plaintiffs by suppressing the following material facts:

(a) the costs paid by the Plaintiffs exceeded the costs disclosed to the plaintiffs.

(b) the Plaintiffs costs would be substantially higher than that disclosed due to the Defendants' receipt of loan repayments.

(c) the Defendants utilized unreasonable repayment periods to calculate the loan costs.

36. Defendants breached their fiduciary duties described hereinabove, and Plaintiffs suffered damages as follows:

(a) paying excessive costs and fees to the Defendants;

(b) foregoing the use of their money; and

(c) suffering mental anguish.

37. As a direct and proximate consequence of Defendants actions, Plaintiffs have been injured and damaged as identified herinabove.

Appendix A

WHEREFORE, PREMISES CONSIDERED, Plaintiffs demand judgment against Defendants jointly and severally for compensatory damages and punitive damages not to exceed $74,900 per named Plaintiff, in an amount to be determined by a jury.

PLAINTIFFS DEMAND TRIAL BY STRUCK JURY

APPENDIX B — IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION DATED AND FILED SEPTEMBER 6, 2002

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

Civil Action No.: CV-02-C-1848-W

MARTHA SUE HARE; OTIS JENNINGS; MILDRED P. SMITH; and WILLIE E. SMITH;

Plaintiffs,

vs.

H & R BLOCK EASTERN TAX SERVICES, INC.; H & R BLOCK, INC.; BENEFICIAL NATIONAL BANK; and BENEFICIAL TAX MASTERS, INC.,

Defendants.

Filed September 6, 2002

PLAINTIFFS' MOTION TO LIFT STAY AND REMAND TO STATE COURT

COME NOW the Plaintiffs, Martha Sue Hare, Otis Jennings, Mildred P. Smith, and Willie E. Smith, by and through their attorney of record, and respectfully request that this Honorable Court lift the stay in this case and order remand to state court. In support of this motion, Plaintiffs state as follows:

Appendix B

A nearly identical case filed against Beneficial National Bank an H&R Block on behalf of several residents of Piekens County, Alabama was recently remanded to state court for lack of subject matter jurisdiction. *See Tracy Brewer, et al. v. H&R Block Eastern Tax Services, Inc., et al.*, CV-02-N-1772-W (N.D. Ala. Sept. 3, 2002) (J. Nelson) (See attached Exhibit "A"). In the *Brewer* case, the plaintiffs allege identical causes of action against the same defendants in the instant case. In that case, District Judge Edwin Nelson denied defendants' Motion to Stay and Ordered remand to state court. The court stated as follows:

OVERRULED WITHOUT PREJUDICE

s/ U.W. Clemon 10/9/02
JUDGE DATE